RECORD AND BRIEFS

Supreme Court U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in asserting authority to review respondents' interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents' individual claims were moot.

2. Whether the court of appeals erred in concluding that the Fifth Amendment forbids the United States Marshals Service for the Southern District of California, with the approval of the district judges in that high-volume jurisdiction, from implementing a policy of placing pretrial detainees in physical restraints during non-jury court proceedings.

PARTIES TO THE PROCEEDING

Petitioner, the United States of America, was the only appellee in the court of appeals. The four respondents were appellants in the court of appeals: Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales (a.k.a. Jasmin Morales), and Mark William Ring.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-70a) is reported at 859 F.3d 649. The opinion of the court of appeals panel (App., *infra*, 71a-82a) is reported at 798 F.3d 1204. The order of the district court (App., *infra*, 83a-99a) is not published in the Federal Supplement but is available at 2013 WL 6145601.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 105a-107a.

STATEMENT

1. The United States Marshals Service was created by the Judiciary Act of 1789 to ensure the safety of federal court personnel, litigants, and the public. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 87. Congress has declared it "the primary role and mission of the United States Marshals Service to provide for the security" of the federal judiciary, including "the United States District Courts." 28 U.S.C. 566(a). The Marshals Service performs its functions in "consult[ation] with the Judicial Conference of the United States," but "retains final authority regarding security requirements for the judicial branch of the Federal Government." 28 U.S.C. 566(i).

a. Courtroom security concerns are particularly acute in the five judicial districts—the Southern District of California, the Districts of Arizona and New Mexico, and the Western and Southern Districts of Texas—on the Nation's southwest border. Those districts alone account for nearly 40% of the Marshals Service's total daily prisoner population. C.A. S.E.R. 64. They also "handle[] a large volume of criminal cases arising from reactive arrests, where the arresting agent typically will know far less about the defendant's background and behavior than agents effectuating arrests following proactive investigations." *Ibid.* By mid-2013, four of those five districts had adopted a policy of "routinely using full restraints for most non-jury proceedings." *Ibid.* "'Full restraints' means that a defendant's hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around

the defendant's waist, and the defendant's feet are shackled and chained together." App., *infra*, 3a; see C.A. S.E.R. 73, 75 (photographs).

The only southwest-border district not yet following such a policy by that time, the Southern District of California, had been "experienc[ing] an increase in security incidents" during the preceding years. C.A. S.E.R. 61. The Marshals Service in that district was (and is) responsible for the security of a recently constructed 16-story Annex courthouse in San Diego, a separate five-story courthouse in San Diego, and a smaller courthouse in El Centro. *Id.* at 59. The completion of the San Diego Annex in 2012 required the Marshals Service to reassign eight deputy marshals from court proceedings to cellblock support functions. *Ibid.* The Marshals Service was nevertheless required to continue to cover "as many as 18 to 22 different district judge and magistrate judge calendars on a single day." *Id.* at 60. It also routinely produced as many as 40 to 50 detainees to a single magistrate's courtroom at the same time. *Ibid.* Detainees usually stand in the jury box, which is 2-7 feet from defense counsel's table, 2-9 feet from the public gallery, 2-7 feet from the interpreter, 11-16 feet from the courtroom clerk, 14-18 feet from the magistrate judge, and 14-19 feet from the unlocked courtroom doors leading to the public hallway. *Ibid.*

b. In March 2013, the United States Marshal for the Southern District of California submitted a letter requesting that the district's judges approve their own "district-wide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings." C.A. E.R. 258. In support of that request, the Marshal emphasized the high volume of detainees (more than 44,000 during Fiscal Year

2012), the practices of similarly situated districts, concerns about "understaff[ing]," and a Marshals Service policy directive instructing deputy marshals to use full restraints during nonjury proceedings unless otherwise directed by a district or magistrate judge. *Id.* at 258-259; see U.S. Marshals Service, *Policy Directives: Prisoner Operations* 9.18.E.3.b, https://www.usmarshals.gov/foia/directives/prisoner_operations.pdf. During the approximately seven months while the Marshal's request was pending before the Southern District's judges, a defendant in that district used a pen to stab a co-defendant during a district court motions hearing, and a detainee in that district wearing only leg restraints assaulted another detainee while waiting for a magistrate judge to take the bench. C.A. S.E.R. 61-62; see C.A. E.R. 258.

In October 2013, after soliciting and considering views from a variety of sources, including the Offices of the U.S. Attorney and the Federal Defender, the Chief Judge informed the Marshal that the judges of the Southern District had approved the Marshal's request in most respects. C.A. E.R. 259. The request was denied, however, as to detainees appearing before district judges at plea and sentencing hearings, during which hand and arm restraints would be removed. *Ibid.* In addition, any district or magistrate judge could "direct the Marshals to produce an in-custody defendant without restraints." *Ibid.* Finally, individual detainees could "ask [a] judge to direct that the[ir] restraints be removed in whole or in part," at which point the judge would make an individualized determination about the necessity of restraints. *Id.* at 260.

2. Respondents are former federal pretrial detainees who made initial appearances before magistrate

judges in the Southern District of California between October and December 2013. C.A. E.R. 7-8, 32, 42. Consistent with the security policy approved by the district judges, the Marshals Service produced each respondent in full restraints.

Respondents objected to the security policy but were overruled. See App., *infra*, 35a & n.2. In support of her decision, one of the magistrate judges explained that full restraints were necessary because the "limited number" of available deputy marshals impedes the Marshals Service's ability to respond "to a danger in a crowded magistrate judge courtroom or holding cell area, and there have been numerous examples of that precise concern happening." C.A. E.R. 15-16 (capitalization altered). She observed that the large volume of criminal matters in the district required the magistrate judges "to handle many matters at the same time during a joint proceeding" involving multiple defendants, even though magistrate courtrooms are "smaller" than district courtrooms and "defendants are in very close proximity to everybody else." *Ibid.* She also observed that "security information" regarding each detainee—such as the detainee's "gang affiliation and his or her relationship" with other detainees—"is often unknown or incomplete" at the time of initial appearance, making it difficult to assess risk in advance. *Id.* at 16. And she reasoned that initial appearances are nonjury proceedings, and a defendant's appearance in "restraints [would] have absolutely no bearing on any decision" that she would make in such a proceeding. *Id.* at 17; see *id.* at 39-40 (additional ruling by same magistrate judge); *id.* at 47 (ruling by another magistrate judge).

Three respondents filed emergency motions challenging the rulings in their cases and asking the district

court to "[r]evoke" the security policy. App., *infra*, 84a. The court denied those motions, as well as a separate appeal by the fourth respondent. *Id.* at 83a-99a, 104a. In denying the motions, the court emphasized several district-specific factors that justified the security policy, including the large number of in-custody detainees, the physical layout of the courtrooms and courthouses, and a troubling record of recent in-court assaults, including a stabbing, as well as "multiple incidents of prisoner-made weapons." *Id.* at 92a-93a. The court also noted that the district's "need for security [had] increased" in recent years due to a focus "on prosecuting defendants with violent or extensive criminal histories, and ties to gangs or drug cartels." *Id.* at 93a.

The district court further explained that "proceedings involving multiple defendants," such as cases in which defendants "enter pleas *en masse* before magistrate judges," pose particularly "heightened" security risks. App., *infra*, 93a, 95a. Southern District judges hear "upwards of 20 cases or more" on a typical calendar day, and "practical considerations make it impossible to know the sequence in which each case will be called." *Id.* at 94a. The process of unshackling a defendant (each of whom is transported in full restraints) "ordinarily requires three Marshals," because two "stand guard to prevent attacks on the Marshal who is unlocking and removing the shackles, either by kicking, or by swinging hand shackles like a mace." *Ibid.*; see C.A. S.E.R. 66-67. Thus, in addition to overtaxing the Marshals Service's limited resources, "[r]equiring the unshackling of each defendant before the hearings, and re-shackling each one afterwards for safe transport, would result in delays of up to two hours" per day per courtroom, "eating up court time" and requiring that

detainees "be held in restraints longer (while waiting for their cases to be called)." App., *infra*, 94a.

In light of those considerations—and the expertise of the Marshals Service, which is "familiar with the tasks of guarding detainees, maintaining courtroom security, and transferring detainees to and from court"—the district court determined that the security policy "is reasonably related to legitimate government interests and does not violate [respondents'] constitutional rights." App., *infra*, 98a-99a. The court emphasized, however, that judges must continue to weigh "countervailing interests" in appropriate cases and to direct "deviations from the policy" when necessary. *Id.* at 98a.

3. In a consolidated appeal, a panel of the court of appeals vacated and remanded for further proceedings. App., *infra*, 71a-82a. The panel declined to hold "that a blanket policy of shackling defendants in non-jury proceedings is never permissible," and it acknowledged that the Ninth Circuit previously had "approved of one such policy." *Id.* at 81a (citing *United States* v. *Howard*, 480 F.3d 1005 (2007)). But the panel concluded that, "[o]n this record, the Southern District has failed to provide adequate justification for its restrictive shackling policy." *Id.* at 73a.

4. The court of appeals granted rehearing en banc and issued a 6-5 decision holding the security policy approved by the Southern District judges to be constitutionally invalid. App., *infra*, 1a-30a.

a. Addressing the threshold question of its own appellate jurisdiction, the majority acknowledged that respondents' requests for "relief not merely for themselves, but for all in-custody defendants in the district," did not fit within its limited jurisdiction over certain "immediately appealable collateral orders," App., *infra*,

6a-7a. But the majority believed that respondents' "class-like claims * * * asking for class-like relief" could be treated as petitions for writs of mandamus. *Id.* at 7a. The majority stated that it was authorized to issue "[s]upervisory and advisory writs" through which it may "provide broader relief" than would be available under a typical writ of mandamus. *Id.* at 8a. And although a writ of mandamus may not be granted absent "clear error," *id.* at 9a (citation omitted), the majority deemed it sufficient for issuance of such a writ that "some form of routine shackling has become a common practice and thus is an oft-repeated error," *id.* at 10a.

The majority further held that the case was not moot, notwithstanding the completion of respondents' criminal cases. App., *infra*, 11a-17a. The majority recognized that respondents are "no longer subject to the complained-of policy" and no longer have "personal interests in the outcome of this case." *Id.* at 11a-12a. The majority also acknowledged that, under the "capable-of-repetition-yet-evading-review exception" to mootness, a likelihood of repetition must exist "as to the particular complainants, and we cannot presume that [respondents] will be subject to criminal proceedings in the future." *Id.* at 12a. The majority concluded, however, that it was authorized to decide this case by *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), which had permitted the continuation of a civil class-action suit notwithstanding the mootness of the original named plaintiffs' claims. App., *infra*, 13a-16a. Although *Gerstein*, unlike this case, involved a civil suit that had formally been certified as a class action, the majority characterized this case as a "functional class action" that could be treated in the same manner. *Id.* at 13a-14a. In the majority's view, so long as a case like this can be deemed

to have three features present in *Gerstein*—a challenge to "broader policies" rather than "individual violations," a "continually changing group[] of injured individuals who would benefit from any relief," and "common representation"—a mandamus claim may outlast the claimant's interest in its resolution. *Ibid.*

On the merits, the majority held that the rule announced in *Deck* v. *Missouri*, 544 U.S. 622 (2005), which concluded that due process requires an individualized justification for visibly restraining a defendant before a jury during the guilt and penalty phases of a criminal trial, *id.* at 624, 629, 633, "applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without." App., *infra*, 19a. The majority recognized that this Court's decision in *Deck* had found "that the common law drew a distinction between trial and pretrial proceedings," because "'Blackstone and other English authorities recognized that the rule [disfavoring restraints] did not apply at the time of arraignment, or like proceedings before the judge.'" *Id.* at 24a (quoting *Deck*, 544 U.S. at 626) (internal quotation marks omitted). But the court of appeals viewed *Deck*'s statement as "dictum" that is "contradicted by the very sources on which the Supreme Court relied." *Ibid.*; see *id.* at 24a-28a. The majority additionally dismissed any potential relevance of *Bell* v. *Wolfish*, 441 U.S. 520 (1979), which applied a reasonableness standard to the conditions in which pretrial detainees are housed. App., *infra*, 28a. And it gave no measurable weight to the expertise of the Marshals Service. *Id.* at 29a.

The majority held that "regardless of a jury's presence or whether it's a pretrial, trial or sentencing proceeding," when "the government seeks to shackle a defendant," it "must first justify the infringement with

specific security needs as to that particular defendant." App., *infra*, 30a. A court must then "decide whether the stated need for security outweighs the infringement on [the] defendant's right," a decision that "cannot be deferred to security providers or presumptively answered by routine policies." *Ibid.* The majority nevertheless withheld "the issuance of a formal writ of mandamus," because the challenged security policy "isn't presently in effect," as a result of the earlier panel ruling. *Ibid.*

Judge Schroeder concurred and expressed particular disagreement with relying on the expertise of the Marshals Service and with the specific policy at issue in this case. App., *infra*, 31a.

b. Judge Ikuta, joined by four other judges, dissented on the ground that the majority's analysis was "wrong at every turn" and invited "potentially grave consequences for state and federal courthouses throughout [the] circuit." App., *infra*, 32a, 70a.

The dissent first explained that the case should have been dismissed as moot because respondents "have no ongoing interest in the purely prospective relief they seek." App., *infra*, 37a. It rejected the majority's "functional class action" exception to mootness, observing that a formal class action like the one in *Gerstein* acquires "'independent legal status'" through certification and that formal judicial certification of a class may "relate back" to the live controversy that existed at the time of filing. *Id.* at 40a, 42a (citation omitted). The dissent further explained that this case "do[es] not meet the requirements for granting a writ of supervisory mandamus," which "may issue only when a district court has engaged in 'willful disobedience.'" *Id.* at 52a (quoting *Will* v. *United States*, 389 U.S. 90, 100 (1967)). It found no such disobedience here, where the district

court had "complied with [the Ninth Circuit's] last word on the matter." *Id.* at 53a (citing *Howard*).

The dissent also criticized the majority for "announc[ing] a new rule of constitutional criminal procedure that is contrary to Supreme Court precedent, creates a split with the Second and Eleventh Circuits, and puts trial courts throughout this circuit at risk." App., *infra*, 54a. Like the court of appeals' "sister circuits," the dissent would have "follow[ed] *Deck*'s reading of the common law," which "establish[es] that there is no common law rule against the use of restraints during pretrial proceedings," and would have abstained from "inventing a new right out of whole cloth." *Id.* at 63a. The dissent explained that the Court's discussion of the common law in *Deck* was neither "mere dictum" nor "contradicted by the historical sources." *Id.* at 56a-57a; see *id.* at 56a-64a. The dissent reasoned that *Bell*, not *Deck*, provides the framework for "analyzing constitutional claims by pretrial detainees challenging their conditions of confinement." *Id.* at 64a. And it found the Southern District's security policy, which is supported by the expert judgment of the Marshals Service, to be a "constitutionally permissible condition of pretrial confinement" under *Bell*, because it is "reasonably related" to legitimate government interests. *Id.* at 68a.

"The majority's rule," the dissent concluded, "fails not only as a matter of law, but also as a matter of common sense." App., *infra*, 70a. The dissent observed that the effect of the rule is to require either that the Marshals Service "do the impossible (predict risks based on a dearth of predictive information)" or else "sit idly by and suffer an identifiable, compelling harm (violence in the courtroom)." *Ibid.* And it predicted that the majority's "one-size-fits-all security decree," laid down "by

appellate jurists far removed from the day-to-day administration of criminal justice," would "put[] federal district courts at risk" and potentially create "even greater dangers" for state courts. *Id.* at 69a & n.14.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held unconstitutional a security policy adopted by the judges of the Southern District of California, in consultation with the United States Marshals Service and others, to ensure the safety of court personnel, litigants, and the public. In doing so, it improperly invented a new type of appellate jurisdiction (the "functional class action" writ of supervisory mandamus); disregarded the express limits of this Court's decision in *Deck* v. *Missouri*, 544 U.S. 622 (2005), to which other circuits have adhered; and imperiled public safety and the efficient administration of justice. As Judge Ikuta observed, the Ninth Circuit "should not [have] hear[d] this case at all, much less us[ed] it to announce a sweeping and unfounded new constitutional rule with potentially grave consequences for state and federal courthouses throughout th[e] circuit." App., *infra*, 32a. Indeed, the decision is already causing serious, ongoing harm to federal and state courts within the Ninth Circuit. This Court should grant certiorari and vacate that decision.*

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* The Ninth Circuit's formal denial of relief to respondents, App., *infra*, 30a, does not preclude this Court's review. The United States has "suffer[ed] injury caused by the adverse constitutional ruling," which prevents it from implementing the approved security policy, and thus has Article III standing to challenge that ruling. *Camreta* v. *Greene*, 563 U.S. 692, 703 (2011). Similarly, because the Ninth Circuit's decision "creates law that governs the * * * behavior" of federal officials, principles of federal appellate practice favor review. *Id.* at 708 ("This Court, needless to say, also plays a role in

A. The Ninth Circuit Lacked Authority Over Respondents' Challenges To The Southern District Of California's Security Policy

The threshold flaw in the decision below is that the Ninth Circuit lacked authority to issue it. The majority's unprecedented recognition of a "functional class action" writ of supervisory mandamus disregards both well-established limitations on interlocutory review and fundamental principles of mootness.

1. The general appellate-jurisdiction statute, 28 U.S.C. 1291, vests the courts of appeals with jurisdiction only over appeals from "final decisions of the district courts." In a criminal case, Section 1291's final judgment rule normally "prohibits appellate review until conviction and imposition of sentence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984). A "'narrow' exception," that "should stay that way and never be allowed to swallow the general rule," *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), exists for a "small class" of collateral rulings that may be treated as final even though they do not end the proceedings in the district court, *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The majority below correctly determined that it could not rely on that collateral-order exception here. App., *infra*, 6a-7a.

The majority instead asserted that it could review the security policy as an exercise of its authority to issue a writ of "supervisory" mandamus. App., *infra*, 11a. But because a writ of mandamus, however styled, "is

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clarifying rights."). To the extent that respondents themselves no longer have a stake in the litigation, see p. 15, *infra*, vacatur of the Ninth Circuit's decision in accordance with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), would be appropriate. See *Camreta*, 563 U.S. at 709-713.

one of the most potent weapons in the judicial arsenal," a number of "conditions" apply to a court's authority to issue one. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004) (citation and internal quotation marks omitted). Among other things, the party seeking the writ must carry "the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381. (brackets, citation, and internal quotation marked omitted). That party must also demonstrate that issuance of the writ is "appropriate under the circumstances," by pointing to "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." *Id.* at 380-381 (citations and internal quotation marks omitted); see *id.* at 390.

Respondents cannot carry either burden here. As the dissent below observed, the district court's ruling "complied with [the Ninth Circuit's] last word on the matter, * * * in which [it] held that restraining pretrial detainees in proceedings before a judge did not violate due process." App., *infra*, 53a (citing *United States* v. *Howard*, 480 F.3d 1005, 1012-1014 (2007)). Although the majority below viewed that preexisting precedent as distinguishable, *id.* at 10a n.6, it did not identify any "clear" error, "judicial usurpation of power, or * * * clear abuse of discretion" by the district court. *Cheney*, 542 U.S. at 380 (citations and internal quotation marks omitted). In the absence of the necessary preconditions for the issuance of a writ of mandamus, the Ninth Circuit erred in relying on its mandamus authority to avoid the limitations on its appellate jurisdiction.

2. Even assuming appellate review of respondents' claims was proper in the first instance, the case became moot when respondents' criminal proceedings concluded.

a. Article III requires that, in order "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation and internal quotation marks omitted). If the plaintiff ceases to have a "personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotation marks omitted) (quoting *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013)).

The majority below correctly recognized that the completion of respondents' criminal cases meant that they were "no longer subject to the policy" under dispute. App., *infra*, 12a. It also correctly recognized that respondents' individual claims did not qualify for the "exception to mootness for disputes that are capable of repetition, yet evading review." *United States* v. *Juvenile Male*, 564 U.S. 932, 938 (2011) (per curiam) (citation and internal quotation marks omitted). That exception "applies only where," *inter alia*, "'there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* (brackets omitted) (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998)). Here, the majority properly refused to "presume that [respondents] will be subject to criminal proceedings in the future," either in the Southern District of California or elsewhere. App., *infra*, 12a. Accordingly, respondents' "personal interests in the outcome of this case ha[d] expired," *ibid.*, and their challenges should have been dismissed as moot.

b. The Ninth Circuit circumvented that jurisdictional rule, however, by characterizing respondents'

claims as a "functional class action," App., *infra*, 13a, and allowing the policy's application to *other* criminal defendants to substitute for the requirement that respondents themselves have a continuing personal stake in the litigation. The court of appeals' asserted basis for its novel theory was *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). But *Gerstein* involved a civil class-action suit, certified as such by the district court, challenging the constitutionality of certain criminal pretrial procedures. See *id.* at 110 n.11. The Court determined that it retained jurisdiction over the suit, even after the named plaintiffs had been convicted and were no longer subject to the challenged procedures, on the ground that the suit "belong[ed] * * * to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Ibid.*

Gerstein's determination that mootness of the named plaintiffs' claims did not require dismissal of a *formal* certified class action lawsuit does not support the Ninth Circuit's invention of a "*functional* class action" petition for mandamus. "The class-action device," which rests on codified legal rules, "was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 155 (1982) (citation and internal quotation marks omitted); see Fed. R. Civ. P. 23. Federal Rule of Civil Procedure 23 only "permits one or more individuals to sue as 'representative parties on behalf of all members' of a class if certain preconditions are met." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1042 (2016) (quoting Rule 23(a)). And, crucial for present purposes, once a class is properly certified under Rule 23, "the class of unnamed

persons described in the certification acquire[s] a legal status separate from the interest asserted by [the class representative]." *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975).

This Court has explained that the existence of a certified class, with its own legal status and interests, "significantly affects the mootness determination." *Sosna*, 419 U.S. at 399. Because "a live controversy may continue to exist" as to "'the class of unnamed persons described in the certification,'" a "class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified." *Genesis Healthcare*, 133 S. Ct. at 1530 (emphasis omitted) (quoting *Sosna*, 419 U.S. at 399). The Court has also extended that principle to cases in which the named plaintiff's claims have become moot before certification—for instance, where the "claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 399 (1980). In such cases, the later certification decision is deemed to "relate[] back" to the time the complaint was filed. *Id.* at 404 n.11; see *Sosna*, 419 U.S. at 402 n.11 (relation-back doctrine's application "may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review"); see also *Genesis Healthcare*, 133 S. Ct. at 1530 (relation-back doctrine "has its roots in *Sosna*").

The majority below erred in viewing *Gerstein*'s application of that relation-back principle, see 420 U.S. at 110 n.11, as authorizing appellate courts to retain mandamus jurisdiction by fashioning their own class-action doctrines, untethered to any statute or rule. Although

application of the relation-back doctrine in *Gerstein* was premised on the inherently "temporary" (*ibid.*) nature of the practices challenged in that case, *Gerstein* and subsequent cases have all involved a properly certified class action with its own "legal status." *Sosna*, 419 U.S. at 399; see *Geraghty*, 445 U.S. at 404 n.11 ("The 'relation back' principle [is] a traditional equitable doctrine [that was] applied to class certification claims in *Gerstein*."); see also *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) (citing *Gerstein* and *Sosna*); *Schall* v. *Martin*, 467 U.S. 253, 256 n.3 (1984) (citing *Gerstein*); *Swisher* v. *Brady*, 438 U.S. 204, 213-214 n.11 (1978) (citing *Sosna*). Conversely, in cases in which class certification was denied, or was granted but later invalidated, the lack of a properly certified class has required dismissal when the named party's personal stake in the matter expired. See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976); *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam) (case moot because of "inadequate compliance with the requirements of Rule 23(c)"); see also *Geraghty*, 445 U.S. at 404 (observing that case "must be dismissed as moot" upon appellate determination "that class certification properly was denied").

c. The Ninth Circuit's "functional class action" invention is particularly difficult to square with *Pasadena City Board of Education* v. *Spangler*, *supra*. In that case, a public school board that had been involved in litigation with students and the United States over segregation-related policies sought appellate review of the district court's denial of leave to modify its desegregation plan. 427 U.S. at 427-429. This Court observed that, because the district court had "never certified" the case as a class action under Rule 23, the case "would

clearly be moot" due to the student plaintiffs' graduation, but for the involvement of the United States. *Id.* at 430. The Court rejected the contention that, because the litigation had been "filed as a class action" and the parties had "treated" it as a class action, Rule 23 certification was an unnecessary "'verbal recital.'" *Ibid.* The Court explained that "while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation." *Ibid.*

The majority below, however, allowed respondents' counsel here to "represent a class of unnamed individuals" who could still have been subject to the challenged policy, in the absence of "certification of any such class which is or was represented by a named party." *Spangler*, 427 U.S. at 430. But "it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977) (citation omitted). That is because class certification is no mere "procedural device." App., *infra*, 14a. Certification represents a judicial finding that injured parties other than the named plaintiff exist, *Sosna*, 419 U.S. at 399, and it provides a definition by which injured parties can be identified, which "is especially important in cases like this one where the litigation is likely to become moot as to the initially named plaintiffs prior to the exhaustion of appellate review," *Jacobs*, 420 U.S. at 130. Certification also ensures that class members will be bound by the outcome, *Smith* v. *Bayer Corp.*, 564 U.S. 299, 315 (2011), and that the action will not be settled or dismissed without appropriate notice, see Fed. R. Civ.

P. 23(e). The Ninth Circuit's "functional class action" device, in contrast, serves no such functions and provides no such assurances.

3. The threshold errors in the Ninth Circuit's decision should be corrected by this Court. The majority's invention of a functional class action supervisory mandamus procedure circumvented basic justiciability requirements; subverted the statutory ban on federal public defenders bringing civil rights claims on behalf of criminal defendants, App., *infra*, 48a (Ikuta, J., dissenting) (citing 18 U.S.C. 3006A); and established a blueprint for courts to "create *de facto* class actions at will," *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008) (citation omitted). Its application of its newly minted procedure in this case enabled a deeply flawed merits decision that is causing substantial harm throughout the Ninth Circuit. Although vacatur of the decision below on threshold grounds would not resolve the merits question, it would eliminate the source of the harm; ensure that any future litigation about the Southern District's security policy occur within recognized channels of judicial review; and make clear that the Ninth Circuit cannot extend and recombine existing doctrines to bootstrap itself out of the limitations on its authority.

B. The Ninth Circuit Wrongly Invalidated The Southern District Of California's Security Policy

Even assuming the court of appeals had authority to review the merits of this case, it erred in invalidating the judicially approved security policy followed in the Southern District of California on the ground that application of physical restraints on a detainee in pretrial nonjury proceedings invariably requires an individualized justification.

1. The majority below viewed its holding as "clarify[ing] the scope of the right" recognized by this Court in *Deck*. App., *infra*, 19a. That view cannot be reconciled with *Deck* itself. *Deck* held that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding" in the absence of an individualized justification. 544 U.S. at 633. In so doing, it drew a clear distinction between guilt and penalty phases at which the jury is present and nonjury pretrial proceedings of the sort at issue in this case.

The decision in *Deck* was grounded in the "deep[ly] root[ed]" common law rule "forbidd[ing] routine use of visible shackles during the guilt phase" of a criminal trial. 544 U.S. at 626. As this Court explained, that common law rule "was meant to protect defendants appearing at trial before a jury" and did not govern pretrial nonjury proceedings. *Ibid.* "Blackstone and other English authorities," the Court observed, "recognized that the rule did not apply at 'the time of arraignment,' or like proceedings before the judge." *Ibid.* (quoting 4 William Blackstone, *Commentaries on the Laws of England* 317 (1769)).

The majority below dismissed this Court's delineation of the common-law rule's scope as "dictum" that "doesn't control this case because it's contradicted by the very sources on which the Supreme Court relied." App., *infra*, 24a. But as the dissent below explained, that portion of *Deck* was "not mere dictum," because it responded to a principal argument of the *Deck* dissenters. *Id.* at 56a; see *id.* at 56a-57a. And as the dissent below further explained, this Court's decision in *Deck* correctly interpreted the common law. *Id.* at 61a; see

id. at 57a-62a (discussing relevant historical authorities).

The decision in *Deck* also relied on the salience, in a sentencing proceeding at which a jury is present, of "three fundamental legal principles" that underlie the common-law rule. 544 U.S. at 630-631. The Court explained that visible restraints "suggest[] to the jury that the justice system itself sees a 'need to separate a defendant from the community at large'"; that limitations on the defendant's movements may diminish an accused's right to a "meaningful defense" by impinging on "the accused's 'ability to communicate' with his lawyer" and his decision "whether to take the witness stand on his own behalf"; and that routine use of restraints "in the presence of juries" undermines the "courtroom's formal dignity." *Ibid.* (citations omitted). Those considerations are inapplicable, or apply with greatly diminished force, in the context of nonjury pretrial proceedings, in which a judge is unlikely to be biased by the presence of restraints and can readily accommodate a defendant's practical needs. See App., *infra*, 63a (Ikuta, J., dissenting).

2. The majority below erred in disregarding the standard set forth in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), for "evaluating the constitutionality of conditions or restrictions of pretrial detention," *id.* at 535. The majority correctly did not dispute that the Southern District's security policy satisfies *Bell*.

a. This Court explained in *Bell* that although pretrial detainees "ha[ve] not been adjudged guilty of any crime," 441 U.S. at 536, the presumption of innocence that will apply at trial "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun," *id.* at 533.

Rather, the conditions under which a pretrial detainee is held "implicate only the protection against deprivation of liberty without due process of law," and thus the "proper inquiry" into the constitutionality of conditions imposed upon him "is whether those conditions amount to punishment of the detainee." *Id.* at 535.

Under *Bell*, in the absence of direct evidence of punitive intent, a condition of pretrial detention will not be deemed "punishment" as long as it "is reasonably related to a legitimate governmental objective." 441 U.S. at 539. In applying that standard, significant deference must be afforded to the professional judgment of those charged with "preserv[ing] internal order and discipline" and "maintain[ing] institutional security." *Id.* at 547; see *id.* at 544 ("The court * * * should not second-guess the expert administrators on matters on which they are better informed.") (citation and internal quotation marks omitted).

b. The district judges' adoption of the Southern District of California's security policy complied with the *Bell* standard. The judges based their decision on substantial district-specific evidence about the need for and purposes of the policy, including the district's exceptionally large population of pretrial detainees; the increasing number of detainees in custody for violent or gang-related offenses; the necessity of multidefendant proceedings in the district's smaller magistrate-judge courtrooms; the strain that a requirement to unshackle each defendant would impose on courtroom resources and on the understaffed Marshals Service; and a number of serious recent security incidents, including an in-court stabbing. See C.A. E.R. 144-146. The judges thus concluded that the policy, which is subject to case-by-case exceptions in individual instances, was "reasonably

related to legitimate government interests." *Id.* at 149. Their decision also afforded appropriate deference to the Marshals Service, in which Congress has invested "final authority" over "security requirements for the judicial branch." 28 U.S.C. 566(i); see C.A. E.R. 148-149.

c. The majority below deemed the *Bell* standard irrelevant on the ground that "*Bell* dealt with pretrial detention facilities, not courtrooms." App., *infra*, 28a. But nothing in *Bell* mandates that the decision be limited in that fashion. And the line drawn by the Ninth Circuit makes little sense.

The majority below did not purport to preclude the Marshals Service from placing pretrial detainees in full restraints for transportation from the detention facility to the courthouse. App., *infra*, 29a n.15 (leaving that question open). Nor did it purport to preclude the use of full restraints in the courthouse itself, other than in courtrooms. Yet as the courtroom incidents in the record in this case demonstrate, crossing the threshold of a courtroom does not make a defendant less dangerous, or erase the security concerns that justify the application of restraints before and after the defendant's courtroom appearance. The majority's reliance on the constitutional "presumption" of innocence to categorically reject the relevance of *Bell*, *id.* at 29a-30a, is in tension with *Bell*'s own description of that presumption as primarily confined to the trial setting, 441 U.S. at 533. A pretrial detainee is not released from the custody of the Marshals Service when he is brought to the courtroom, and the presence of the judge and others only increases the scope of the Marshals Service's protective function.

Even if the dignity of the courtroom might justify viewing restraints in that setting "more skeptically than those deployed in an institutional setting," App., *infra*,

29a-30a, it nevertheless would not justify the highly restrictive standard adopted by the majority here, which treats nonjury pretrial proceedings no differently from capital sentencing or other jury proceedings. It should not be impossible for the Marshals Service to rely on the general concerns that justify the use of restraints on pretrial detainees at other locations to justify a default policy of leaving those restraints in place in the courtroom, subject to the detainee's ability to make an individualized objection to the judge.

C. The Decision Below Warrants This Court's Review

The Ninth Circuit's erroneous extension of its own authority to misapply *Deck* to pretrial nonjury proceedings warrants this Court's review. The reasoning of the majority below cannot be squared with the reasoning of other circuits, and its holding has given rise to a host of serious safety and administrative problems in courts within the Ninth Circuit, which contains 20% of the Nation's population. See Population Division, U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016* (Tbl. 1), https://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx.

1. In contrast to the Ninth Circuit, two other courts of appeals have concluded that judges are required to make defendant-specific restraint decisions only in proceedings that involve a jury. See App., *infra*, 62a-63a (Ikuta, J., dissenting) (describing decision below as creating a "split" with the Second and Eleventh Circuits).

In *United States* v. *Zuber*, 118 F.3d 101 (2d Cir. 1997), a criminal defendant argued that the district court "violated his due process rights" by permitting

the use of arm and leg restraints at his sentencing hearing "without making an independent evaluation of the need to employ these restraints." *Id.* at 102. The Second Circuit disagreed, holding "that the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing." *Ibid.* The court reasoned that "juror bias" is the "paramount concern" of authorities that require an independent judicial evaluation of necessity, and it observed that courts "traditionally assume" that judges, "unlike juries," will not be prejudiced by bias or other impermissible factors. *Id.* at 103-104.

The Second Circuit also rejected the defendant's argument "that the district court erred in deferring to the recommendation of the Marshals Service on the need to restrain the defendant at his sentencing hearing." *Zuber*, 118 F.3d at 103. The court observed that the Marshals Service is "charged with the movement of persons in custody in and around the courthouse, and responsible also for court security." *Id.* at 104 (citing 28 U.S.C. 566(a)). The court therefore reasoned that a district judge may, "without further inquiry," elect to "defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances." *Ibid.*

Similarly, in *United States* v. *LaFond*, 783 F.3d 1216, cert. denied, 136 S. Ct. 213 (2015), the Eleventh Circuit held that the "rule against shackling pertains only to a jury trial," and thus "the Constitution does not prohibit the shackling of a defendant during a sentencing hearing before a district judge." *Id.* at 1221-1222, 1225. In so ruling, the court explicitly rejected the defendant's

argument that the rule announced in *Deck* applies to nonjury proceedings. The court relied on the same historical authority that this Court relied on in *Deck*, *id.* at 1225, and explained that "the Supreme Court made clear in *Deck* that the rule 'was meant to protect defendants appearing at trial before a jury,'" *ibid.* (quoting *Deck*, 544 U.S. at 626); see *ibid.* ("American courts have traditionally followed Blackstone's 'ancient' English rule.") (quoting *Deck*, 544 U.S. at 626-627).

2. The Ninth Circuit's jurisdictionally flawed misapplication of *Deck* to pretrial nonjury proceedings presents an issue of exceptional importance, in light of the immense safety and administrative concerns it has generated for the Marshals Service and the courts. The majority below held that criminal defendants may not be restrained at any point in the courtroom unless the judge "make[s] an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom." App., *infra*, 20a; see *id.* at 20a n.9 ("Courts may not incorporate by reference previous justifications in a general fashion."). But individualized evidence "about what threat, if any, a pretrial detainee poses" will rarely be available. *Id.* at 70a (Ikuta, J., dissenting). The Ninth Circuit's standard is thus generally impossible to satisfy, see *id.* at 69a-70a, and the resulting de facto bar on physically restraining nearly any pretrial detainee creates major practical problems.

a. The Marshals Service in the Southern District of California is responsible for a "massive" volume of pretrial detainees. C.A. S.E.R. 57. In 2013, deputy marshals "handled approximately 39,000 in-custody court appearances and approximately 14,500 transfers

through district cellblocks," moving more than 200 prisoners through Southern District cellblocks each day. *Ibid.* (footnote omitted). Due to a combination of factors, however, the deputy marshals generally "know little" about these detainees. *Ibid.*

Pretrial detainees placed into the custody of the Marshals Service in the Southern District of California arrive from a wide range of different detention facilities located around the State (and one contract facility in Arizona). C.A. S.E.R. 57. The originating facility "typically has performed only preliminary medical screening and initial 'social screening,'" as necessary to classify inmates and find suitable housing assignments, before surrendering detainees into the Marshals Service's custody. *Id.* at 58. And even that limited preliminary screening process is based largely on detainee "self-reporting," *ibid.*, which may be inaccurate. Thus, while the preliminary screening might theoretically assist in identifying some gang affiliations, "it in no way informs" the deputy marshals "of all affiliations or provides any detail or insight for how groups of inmates will interact with one another." *Ibid.*

Even after the Marshals Service accepts custody of a detainee, the deputy marshals have "no meaningful time or ability to assess" the detainee "for security concerns" on an individualized basis, because detainees must undergo tuberculosis screenings and meet with defense counsel before any initial appearance in court. C.A. S.E.R. 58-59. And a "large number" of the Southern District's detainees do not live in the United States, meaning that criminal-record histories or gang affiliations "may not be available via U.S. law enforcement databases." *Id.* at 58; see C.A. E.R. 689 ("We can't tell who the dangerous people are.") (capitalization altered).

b. Because the Marshals Service has no realistic way of making an individualized assessment or showing of necessity in the vast majority of cases, the decision below effectively requires the Marshals Service to produce most detainees without *any* restraints. The majority below did not explain its statement that "innocent defendants may not be shackled at any point in the courtroom," App., *infra*, 22a, but the Marshals Service informs this Office that courts within the Circuit have interpreted the decision as foreclosing the use of either leg or arm restraints. The unknown risk of violence posed by wholly unrestrained detainees will fall most heavily on the judges, deputy marshals, courtroom employees, interpreters, and attorneys whose jobs require them to work in close quarters with those detainees.

In 2013, for example, in addition to the multiple in-courtroom incidents previously described, see p. 4, *supra*, the Marshals Service dealt with "more than" seven inmate-on-staff assaults or altercations, one of which began in a courtroom and continued into the holding cell. Of those incidents, six involved a detainee charged with a nonviolent (narcotics or immigration) offense. C.A. S.E.R. 62. The Marshals Service has also found potential weapons on several detainees who had already been strip-searched before entering the central cellblock, including razor blades and a "heavy gauge metal object," *id.* at 62-63; see C.A. E.R. 721-722, suggesting that such weapons could potentially be smuggled into the courtroom as well. Compounding these security concerns, the recent focus on violent and gang-related crimes has led to an increasingly dangerous detainee population. C.A. S.E.R. 53-54, 61. At the same time, the Marshal Service's cellblock and courtroom responsibilities in the Southern District have increased with

the addition of the new Annex, even though its staffing has shrunk. See p. 3, *supra*. As the Marshals Service explained to the district court, the security policy here "is a prudent method for maintaining order and security, rather than attempting to *restore* order and security with limited staffing following an incident that may occur in any courtroom across a sprawling federal courthouse complex." C.A. S.E.R. 68.

c. The effects of the decision below are not limited to the Southern District of California, but apply broadly throughout the Ninth Circuit, which includes two of the five southwest-border districts. See *In re Zermeno-Gomez*, No. 17-71867, 2017 WL 3678174 (9th Cir. Aug. 25, 2017) (ordering judges within the District of Arizona to comply with the decision below). The unique situation of those border districts gives rise to especially vexing problems. The Southern District of California handles the fifth-most criminal cases in the federal judiciary; Arizona handles the third-most. Together, those two districts managed 12.87% of the country's federal criminal cases in the 12 months ending March 31, 2016. Of those 10,237 cases, over 40% (4,156) were immigration cases, see C.A. E.R. 851-852, 921, the vast majority of which were resolved by pleas. See *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2016* (Tbl. D-4), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_d4_0331.2016.pdf. The resulting quantity of pretrial and plea proceedings requires those districts to depend, as a practical "necessity," on multidefendant proceedings, often held before magistrate judges. C.A. E.R. 852.

The Ninth Circuit's decision, however, makes the routine use of such proceedings effectively impossible.

The Marshals Service in the Southern District has informed this Office that, to ensure the safety of court personnel, detainees, and the public, it currently requires that each courtroom with unrestrained detainees contain one deputy marshal assigned to each such detainee, plus one additional deputy marshal with more general responsibility for the courtroom as a whole. A typical Southern District plea proceeding involving up to six detainees, C.A. E.R. 852, would thus necessitate seven deputy marshals in a single courtroom—a resource impossibility, given the many courtrooms that deputy marshals must cover. See C.A. S.E.R. 59-60.

Unable to rely on multidefendant proceedings, the Southern District of California's courtrooms are now forced to process all defendants singly or two or three at a time. But removing the full restraints in which each detainee is transported to the courthouse before that detainee enters the courtroom, and reapplying those restraints after each detainee exits the courtroom, could add hours to a typical criminal calendar. See C.A. E.R. 146 (anticipating "delays of up to two hours" per day per courtroom). Removal and reapplication are each ordinarily a three-person job that takes two to three minutes per detainee. *Ibid.*; see *id.* at 690-691, 823, 907, 922. On a typical calendar day, a San Diego federal judge hears 20 or more criminal cases. In Arizona, it is not unusual for a magistrate judge to process defendants "in groups as large as 70 at a time." Curt Prendergast, *Shackles no longer required on all federal defendants in Tucson*, Arizona Daily Star, July 26, 2017, http://tucson.com/news/local/shackles-no-longer-required-on-all-federal-defendants-in-tucson/article_d75314b7-

b8c9-5fec-a646-d3a95ae0dd85.html. The laborious removal and reapplication process will thus significantly extend the typical court day.

d. The burdens imposed by the ruling below will not fall on the federal judicial system alone. The "blanket constitutional rule" will likely "also restrict[] the choices that states * * * can make to secure detainees without inviting a lawsuit under § 1983." App., *infra*, 69a.

Like the federal border districts, many state courts routinely restrain detainees during nonjury proceedings. See Dirk VanderHart, *Local Courts Have Been Improperly Shackling Inmates, a Ruling Finds*, The Portland Mercury, June 28, 2017, http://www.portlandmercury.com/news/2017/06/28/19123973/local-courts-have-been-improperly-shackling-inmates-a-ruling-finds; Jessica Prokop, *The Case for and against shackles*, The Columbian, June 18, 2017, http://www.columbian.com/news/2017/jun/18/the-case-for-and-against-shackles/. Unlike the federal courts, however, those state courts usually do not have the benefit of a specialized law-enforcement agency like the Marshals Service to provide courtroom security. Instead, "most state and local judges are protected by all-purpose local sheriff or police departments." App., *infra*, 69a n.14 (brackets and citation omitted). Yet state courthouses process even more criminal detainees than their federal counterparts. See VanderHart, *supra*, at 2 ("We're moving dozens of people a day, and on some days hundreds."). The combination of higher detainee volumes and less-experienced security personnel means that state courthouses will "face even greater dangers than federal courthouses." App., *infra*, 69a n.14.

Indeed, state systems are already experiencing the burdensome effects of the court of appeals' decision. In one Washington state courthouse, for example, when the deputies assigned to a judge's domestic-violence calendar brought each detainee into court "one at a time" and unrestrained, it took the judge 5½ hours to resolve a docket that "typically takes about two hours to complete." Prokop, *supra*, at A1. Similarly, in one Oregon county courthouse, the deputies must move detainees through the same corridors used by the public because the courthouse is not connected to the jail. VanderHart, *supra*, at 2. Only by "fully restraining inmates" can state officers "cut down on the number of deputies needed to ferry them to court hearings and back." *Ibid.* But because detainees must "now [be] unshackled during those hearings, the sheriff's office is exploring whether it will either have to hire more corrections staff or reduce how many inmates can be transported in a given day." *Ibid.* The former option will place additional burdens on the public fisc; the latter option will slow the pace of criminal proceedings and increase the overall length of pretrial detention, meaning that even detainees themselves will bear the costs of the Ninth Circuit's erroneous decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-50561
D.C. No. 3:13-mj-03928-BLM-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RENE SANCHEZ-GOMEZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Barbara Lynn Major, Magistrate Judge, Presiding

No. 13-50562
D.C. No. 3:13-mj-03882-JMA-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MOISES PATRICIO-GUZMAN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Jan M. Adler, Magistrate Judge, Presiding

No. 13-50566
D.C. No. 3:13-cr-04126-JLS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASMIN ISABEL MORALES, AKA JASMIN MORALES, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

No. 13-50571
D.C. No. 3:13-cr-03876-MMA-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARK WILLIAM RING, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Filed: May 31, 2017

OPINION

Before: SIDNEY R. THOMAS, Chief Judge, and MARY M. SCHROEDER, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN,

SUSAN P. GRABER, RICHARD A. PAEZ, MARSHA S. BERZON, CONSUELO M. CALLAHAN and SANDRA S. IKUTA, Circuit Judges.

KOZINSKI, Circuit Judge:

We consider whether a district court's policy of routinely shackling all pretrial detainees in the courtroom is constitutional.

BACKGROUND

In 2013, the judges of the Southern District of California acceded to the U.S. Marshals Service's request for "a districtwide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings." "Full restraints" means that a defendant's hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around the defendant's waist, and the defendant's feet are shackled and chained together.

After seeking input from the U.S. Attorney's Office, the Federal Defenders of San Diego and a Criminal Justice Act panel representative, the judges adopted the policy[1] of deferring to the Marshals' shackling decisions, with a few minor exceptions. The judges retained discretion to "direct the Marshals to produce an in-custody defendant without restraints." And the district judges, but not the magistrates, directed the Marshals to "remove arm and hand restraints during guilty pleas and sentencing hearings before them unless the Marshals [were] aware of information that the particu-

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[1] Several district judges avoid the term "policy" and instead claim it's just a *practice*. We don't see the difference.

lar defendant need[ed] to be fully restrained." Additionally, "defendants in individual cases may ask the judge to direct that the restraints be removed in whole or in part," at which point the judge would "weigh all appropriate factors, including all of the concerns" expressed by the Marshals in justifying the routine use of full restraints. Only one district judge, Judge Marilyn Huff, opted out of the policy altogether. For the rest of the Southern District's judges, the Marshals shackled all in-custody defendants at pretrial proceedings.

Starting on the first day of the policy's implementation, the Federal Defenders of San Diego objected to the routine use of shackles and requested that each defendant's shackles be removed. The judges routinely denied the requests, relying on the Marshals Service's general security concerns as well as concerns particular to the Southern District. They pointed to increasing security threats from what they viewed as changing demographics and increasing case loads in their district.[2] After ruling on a few individual objections, the judges indicated that they didn't "want to go through it a bunch of times." "For the record," one judge helpfully noted, "every defendant that has come out is in th[e] exact same shackling; so [counsel doesn't] have to repeat that every time."

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[2] Evidence presented in a mandamus proceeding that transpired during the course of this appeal indicates that the Southern District's case load was increasing up to the year preceding the adoption of the routine shackling policy. But after 2012, case loads decreased and, as of 2015, had reached their lowest level in years.

The shackling was the same regardless of a defendant's individual characteristics. One defendant had a fractured wrist but appeared in court wearing full restraints. The judge denied her motion "for all of the reasons previously stated." Another defendant was vision-impaired. One of his hands was free of restraint so he could use his cane, but his other hand was shackled and secured to a chain around his waist and his legs were shackled together. His objection was "denied for all the reasons previously stated." And another defendant was shackled despite being brought into court in a wheelchair due to her "dire and deteriorating" health. The court "noted" her objection to the shackles and "appreciate[d] [counsel] not taking anymore time" with it.

The four defendants here, Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales and Mark Ring, all appeared in shackles and objected to their use. The magistrate judges overruled the objections in each instance. Defendants appealed these denials to the district court and also filed "emergency motions" challenging the constitutionality of the district-wide policy. The district courts denied all relief. All four cases are now consolidated before us.[3]

ANALYSIS

A. Appellate Jurisdiction

1. In *United States* v. *Howard*, we considered shackling claims similar to the ones raised here. 480 F.3d

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[3] Defendants also appealed discovery and recusal decisions. We don't reach these issues.

1005, 1008 (9th Cir. 2007). The Central District of California had adopted a routine shackling policy in consultation with the U.S. Marshals Service. *Id.* The policy required defendants to be shackled in leg restraints at their initial appearances. *Id.* The public defenders objected, claiming that the use of leg restraints on individual defendants violated the defendants' liberty interests under the Fifth Amendment. *Id.* at 1009, 1013. They appealed the district court's denial of the unshackling motions without waiting for the defendants' criminal cases to conclude. *Id.*

We held that we had jurisdiction to review the district's shackling decisions as immediately appealable collateral orders. *Id.* at 1011. Such orders "(1) conclusively determine[] the disputed question, (2) resolve[] an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment." *Sell* v. *United States*, 539 U.S. 166, 176 (2003) (internal quotation marks, brackets and citation omitted). The government urges us to reconsider *Howard*, arguing that shackling decisions don't satisfy the requirements for immediately appealable collateral orders.

Presented for our review in this appeal are individual shackling decisions as well as district-wide challenges to the shackling policy. The main dispute in this case, however, is the district-wide shackling policy. Because we do not review the individual defendants' shackling decisions, we see no reason to revisit *Howard*'s appellate jurisdiction analysis as it applies to those appeals.

The district-wide challenges introduce a wrinkle in this case that *Howard* didn't address. Defendants challenge the Southern District's policy of routinely shackling in-custody defendants without an individualized determination that they pose a material risk of flight or violence. Defendants seek relief not merely for themselves, but for all in-custody defendants in the district. Thus, defendants are making class-like claims and asking for class-like relief.

Such claims are sometimes brought as civil class actions.[4] *See, e.g.*, *De Abadia-Peixoto* v. *U.S. Dep't of Homeland Sec.*, 277 F.R.D. 572, 574 (N.D. Cal. 2011) (using a civil class action to challenge an Immigration and Customs Enforcement policy of shackling all detainees in San Francisco's immigration court). But we can also construe such claims as petitions for writs of mandamus when we lack appellate jurisdiction and mandamus relief is otherwise appropriate. *See Miller* v. *Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc). We "treat the notice of appeal as a petition for a writ of mandamus and consider the issues under the factors set forth in *Bauman*." *Id.* (citation omitted).

2. "The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): 'The Supreme Court and all courts established by Act of

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[4] We noted in *Howard* that indigent defendants have little ability to bring civil class actions as a practical matter. 480 F.3d at 1010. They aren't guaranteed counsel to pursue civil rights claims, *cf.* Fed. R. Crim. P. 44, and defender organizations—like the Federal Defenders of San Diego—ordinarily have limited mandates that do not include filing class actions on behalf of their clients. *See* 18 U.S.C. § 3006A(g)(2).

Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'" *Cheney* v. *U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). "Historically, a writ of mandamus was an order compelling a court or officer to act." *In re United States*, 791 F.3d 945, 953 (9th Cir. 2015).

Another use of the writ is to exercise our "supervisory" or "advisory" authority. Supervisory and advisory writs are appropriate in cases "involving questions of law of major importance to the administration of the district courts." *In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1307 (9th Cir. 1982); *see also La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."). This authority allows courts to provide broader relief than merely ordering that the respondent act or refrain from acting, which promotes the writ's "vital corrective and didactic function." *Will* v. *United States*, 389 U.S. 90, 107 (1967); *see also* 16 Charles Alan Wright et al., *Federal Practice and Procedure* §§ 3934, 3934.1 (3d ed. 2016) (describing the history and modern usage of this authority).

The Supreme Court has announced three conditions for issuing the writ: First, to ensure that the writ doesn't replace the regular appeals process, there must be "no other adequate means to attain the relief"; second, the petitioner must have a "clear and indisputable" right to the writ; and, lastly, the court, in its discretion, must be "satisfied that the writ is appropriate

under the circumstances." *Cheney*, 542 U.S. at 380-81 (internal quotation marks and citations omitted). These conditions are consistent with the five factors our circuit has used since *Bauman* v. *U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977), to determine whether mandamus relief is appropriate:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Hernandez v. *Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010) (internal quotation marks omitted) (quoting *Perry* v. *Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2009)); *see also Bauman*, 557 F.2d at 654-55.

All of the *Bauman* factors need not be present to justify the writ. *See In re Cement Antitrust Litig.*, 688 F.2d at 1301, 1304 (noting that the fourth and fifth factors are rarely present in the same case). "Except for supervisory mandamus cases, the absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus." *Calderon* v. *U.S. Dist. Court for the Cent. Dist. of Cal.*, 163 F.3d 530, 534 (9th Cir. 1998) (en banc), *abrogated on other grounds by Woodford* v. *Garceau*, 538 U.S. 202 (2003). "In the final analysis, the decision of whether to issue the writ

lies within our discretion." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011) (citation omitted).

The *Bauman* and *Cheney* factors favor our review. There is no danger that the writ will supplant the normal appeals process because the district-wide shackling claims aren't connected to defendants' individual criminal cases.[5] The policy doesn't apply to jury trials; thus, it causes no prejudice that would justify reversal of a conviction in a direct appeal. This case also raises new and important constitutional issues that haven't been fully considered by this court. *See United States* v. *Brandau*, 578 F.3d 1064, 1065 (9th Cir. 2009). And a survey of our circuit's district courts shows that some form of routine shackling has become a common practice and thus is an oft-repeated error.[6]

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[5] While these are criminal cases, they aren't subject to special criminal mandamus petition rules. The dissent discusses *Will* v. *United States* as though it narrowed the availability of the writ of mandamus in criminal cases. *See* dissent at 53-54. It didn't. The Supreme Court in *Will* explained that courts of appeals may resolve erroneous district court practices through mandamus petitions, even in criminal cases. 389 U.S. at 104-05 (discussing *La Buy*, 352 U.S. at 258). That's exactly what we do here. The Court also cautioned that mandamus petitions brought by the *government* in criminal cases raise concerns about speedy trials and double jeopardy. *Id.* at 96-98. None of those concerns are applicable here.

[6] The dissent faults us for "equat[ing] a good faith effort to follow our case law" with a clear and repeated error. Dissent at 54. According to the dissent, "the district court complied with our last word on the matter, *Howard*." *Id.* at 54. The dissent errs. We explicitly noted in *Howard* that the policy we were addressing was "less restrictive than the previous policy requiring full restraints."

Accordingly, we construe defendants' appeals as petitions for writs of mandamus under our supervisory authority and find that we have jurisdiction to consider them.

B. Mootness

Article III's "case-or-controversy limitation" on federal court jurisdiction requires a live controversy between two adversaries. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Supervisory mandamus cases require live controversies even when we don't order a lower court to take or refrain from a specific action. *See In re United States*, 791 F.3d at 952. Neither party claims that this case is moot, but the court "must assure itself of its own jurisdiction." *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012). There are two circumstances in this case that raise the possibility of mootness: (1) the named defendants' cases have ended, so they're no longer subject to the complained-of policy, and (2) the challenged policy is no longer in effect.

1. "In cases where intervening events have rendered the writ an ineffective or superfluous remedy, but where the controversy nonetheless remains live, we have occasionally reviewed the district court's decision for error while withholding a formal writ." *In re United States*, 791 F.3d at 953 (citing *Phoenix Newspapers, Inc.* v. *U.S. Dist. Court for the Dist. of Ariz.*, 156 F.3d 940, 952 (1998); *United States* v. *Brooklier*, 685 F.2d 1162, 1173 (9th Cir. 1982)). We do so when it

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480 F.3d at 1014. Nothing in *Howard* endorsed the routine use of full restraints.

would have been appropriate to issue the writ at the time the petition was filed. *Id.* at 954. This allows us to review "important issues that would otherwise escape review, while [e]nsuring that such review is limited to truly extraordinary circumstances." *Id.*

Two of the defendants, Rene Sanchez-Gomez and Jasmin Isabel Morales, were not yet convicted and so were still subject to the pretrial shackling policy when they filed their notices of appeal. Construing their notices of appeal as petitions for writs of mandamus, they had a direct stake in the resolution of the controversy at the time their petitions were filed.

Named plaintiffs—or, in the mandamus setting, petitioners—must also have a continuing personal interest in the outcome of the case throughout the litigation. *See Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016). Because they are no longer subject to the policy, defendants' personal interests in the outcome of this case have expired.

We faced the same issue in *Howard*. The defendants' criminal cases ended before their shackling appeals could be heard. 480 F.3d at 1009-10. We held that the case wasn't moot because it fell into the capable-of-repetition-yet-evading-review exception. *Id.* This exception requires repetition as to the particular complainants, and we cannot presume that defendants will be subject to criminal proceedings in the future. *Id.* But *some* criminal defendants would have been subject to the challenged policy during the litigation and would personally benefit from resolving the case. Thus, we employed the capable-of-repetition-yet-evading-review mootness exception that applied to the class action in

Gerstein v. *Pugh*, 420 U.S. 103 (1975). Though *Howard* wasn't a class action, the case served the same functional purpose—it was a functional class action. *See* 480 F.3d at 1009-10.

The Supreme Court in *Gerstein* applied the capable-of-repetition-yet-evading-review mootness exception even though the named plaintiff was no longer subject to the challenged practice. 420 U.S. at 110 n.11. In that case, the class was composed of defendants held in pretrial detention without a probable cause hearing. *Id.* at 105-06. It wasn't clear that any representative plaintiff would remain in pretrial custody long enough for the judge to certify the class, much less decide the case. *Id.* at 110 n.11. But the class would continually fill with new in-custody defendants who had a live interest in the case. *Id.* The attorney representing the class was a public defender who would continue to represent at least some of those new defendants and class members. *Id.* Under those circumstances, the Court held that the case wasn't moot because the harm was capable of repetition yet evading review as to *some* member of the class throughout the litigation. *Id.*

We have applied *Gerstein*'s analysis to functional class actions with inherently transitory claims. *See Howard*, 480 F.3d at 1009-10; *Or. Advocacy Ctr.* v. *Mink*, 322 F.3d 1101, 1117-18 (9th Cir. 2003).[7] These

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[7] Contrary to the dissent's claim, dissent at 50-51, *Oregon Advocacy Center* was not just about associational standing. After determining that the plaintiffs had standing to bring the suit, we then turned to whether the case was moot—a distinct issue. *Compare* 322 F.3d at 1108-16 (discussing standing), *with id.* at 1116-18 (discussing mootness).

cases involve circumstances "analogous to those found in class action cases where, because of the inherently transitory nature of the claims," an individual's interests would expire before litigation could be completed. *Or. Advocacy Ctr.*, 322 F.3d at 1117. Functional class actions share the same three features that animated the Supreme Court in *Gerstein*: They challenge not merely individual violations, but also broader policies or practices. *See id.* at 1118. Thus, they consist of continually changing groups of injured individuals who would benefit from any relief the court renders. And they have common representation, thereby guaranteeing that the cases will be zealously advocated even though the named individuals no longer have live interests in the case. *See id.* at 1117.

The dissent disputes this application of *Gerstein*. According to the dissent, *Gerstein* and related cases require "the existence of a procedural mechanism, such as [Federal Rule of Civil Procedure] 23," for their mootness exceptions to apply. Dissent at 46-47. But the rule in *Gerstein* doesn't turn on the presence of a procedural device like Rule 23. 420 U.S. at 110 n.11. Rather, *Gerstein*'s rule resolves the problem of inherently transitory claims while ensuring there is a live controversy for which the court can provide relief. *Id.*

The Supreme Court itself has indicated that *Gerstein*'s broadening of the capable-of-repetition-yet-evading-review mootness exception could apply to cases sufficiently similar to class actions. The Court discussed *Gerstein*'s factors in a case brought under the Fair Labor Standards Act (FLSA), *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523 (2013). Unlike the

class action procedures in Rule 23, the FLSA's "'conditional certification' does not produce a class with an independent legal status." *Id.* at 1530. The Court nonetheless considered whether, under *Gerstein*, the plaintiff's injury might be capable of repetition yet evading review. *Id.* at 1531; *see also id.* at 1530 (recognizing that the Court's holdings in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), depended on the "independent legal status" of class actions while making no such claim about *Gerstein*'s holding).

The dissent claims that *Genesis Healthcare* still requires "the existence of a procedural mechanism . . . to aggregate the claims" as a "necessary prerequisite" for *Gerstein*'s analysis to apply. Dissent at 46-47. But the Court did not say so. Instead, the Court noted that its application of *Gerstein* has "invariably focused on the fleeting nature of the challenged conduct giving rise to the claim." 133 S. Ct. at 1531. The dissent's excursus on mootness also ignores that this is a supervisory mandamus case. *See* dissent at 39-53. In its supervisory mandamus role, a court of appeals properly addresses the harm of a district court policy affecting a huge class of persons who aren't parties to the mandamus petition. *See, e.g.*, *Will*, 389 U.S. at 95, 104-06; *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110-12 (1964); *La Buy*, 352 U.S. at 257-60. Unlike the dissent, *see* dissent at 50 n.5, the Supreme Court hasn't found a constitutional infirmity with such cases. Thus, the dissent's concerns about the lack of formal joinder and whether the decision binds other defendants, *see id.* at 46-49, are misplaced.

All of the Court's considerations in *Gerstein* are present here, and the harm—unconstitutional pretrial shackling—is inherently ephemeral, just like the pretrial detention challenges in *Gerstein*. We are faced with an ever-refilling but short-lived class of in-custody defendants who are subject to the challenged pretrial shackling policy. At least some members of this functional class continue to suffer the complained-of injury. Most of the defendants are represented by the Federal Defenders of San Diego. And even if we must withhold a formal writ, we can provide district-wide relief by exercising our supervisory mandamus authority, thus demonstrating that there is a live controversy here. *See Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks and citations omitted)); *see also In re United States*, 791 F.3d at 954 ("[W]e are not categorically precluded from opining on the merits of a mandamus petition when issuance of the writ would no longer be effective.").

2. Shortly after the original panel decision in this case, the Southern District of California changed its shackling policy in response to additional litigation about its continued use of five-point restraints. But the district court's decision to change the policy was only a voluntary cessation. *See Friends of the Earth*, 528 U.S. at 189. The appealed policy could be reinstated at any time. In fact, the government has indicated that it will seek to reinstate the policy unless we hold it un-

constitutional. Thus, there is still a live controversy over the shackling policy.

C. The Fundamental Right to be Free of Unwarranted Restraints

At the heart of our criminal justice system is the well-worn phrase, innocent until proven guilty. *See Taylor* v. *Kentucky*, 436 U.S. 478, 483 (1978). And while the phrase may be well-worn, it must also be worn well: We must guard against any gradual erosion of the principle it represents, whether in practice or appearance. This principle safeguards our most basic constitutional liberties, including the right to be free from unwarranted restraints. *See Deck* v. *Missouri*, 544 U.S. 622, 629-30 (2005).

1. Under the Fifth Amendment, no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has said time and again that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg* v. *Romeo*, 457 U.S. 307, 316 (1982) (alteration in original) (quoting *Greenholtz* v. *Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)). Liberty from bodily restraint includes the right to be free from shackles in the courtroom. *See Deck*, 544 U.S. at 629.

The Supreme Court held in *Deck* v. *Missouri* that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an es-

sential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Id.* at 624 (quoting *Holbrook* v. *Flynn*, 475 U.S. 560, 568-69 (1986)). In evaluating the government's justification, a court may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Id.* at 629. While the decision whether to shackle is entrusted to the court's discretion, routine shackling isn't permitted. *Id.* at 629, 633. Instead, courts must make specific determinations of necessity in individual cases. *Id.* at 633.

The Supreme Court identified three constitutional anchors for the right: (1) the presumption that a defendant is innocent until proven guilty; (2) the Sixth Amendment right to counsel and participation in one's own defense; and (3) the dignity and decorum of the judicial process, including "the respectful treatment of defendants." *Id.* at 630-31. In jury proceedings, an additional concern is that the sight of a defendant in shackles would prejudice the jury against him. Because prejudice is difficult to discern from a cold record, shackles visible to the jury are considered "inherently prejudicial." *Id.* at 635 (quoting *Holbrook*, 475 U.S. at 568). But when security needs outweigh these other concerns, even visible restraints may be used. *Id.* at 632.

Consistent with *Deck*, we have held that criminal defendants have a "constitutional right to be free of shackles and handcuffs in the presence of the jury absent an essential state interest that justifies the physical restraints." *Williams* v. *Woodford*, 384 F.3d 567,

591 (9th Cir. 2004) (citations omitted). We require lower courts to consider concerns similar to those articulated by the Court in *Deck*, such as whether shackles would prejudice the jury, diminish the presumption of innocence, impair the defendant's mental capabilities, interfere with the defendant's ability to communicate with counsel, detract from the dignity and decorum of the courtroom or cause physical pain. *See Spain* v. *Rushen*, 883 F.2d 712, 721 (9th Cir. 1989). "'In all [ ] cases in which shackling has been approved,' we have noted, there has been 'evidence of disruptive *courtroom* behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a *pattern* of defiant behavior toward corrections officials and judicial authorities.'" *Gonzalez* v. *Pliler*, 341 F.3d 897, 900 (9th Cir. 2003) (alteration in original) (quoting *Duckett* v. *Godinez*, 67 F.3d 734, 749 (9th Cir. 1995)).

We now clarify the scope of the right and hold that it applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without.[8] Before a presumptively

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[8] The Second Circuit in a pre-*Deck* case, *United States* v. *Zuber*, did not recognize a right to individualized shackling determinations before a sentencing judge. 118 F.3d 101, 104 (2d Cir. 1997). But the court didn't hold that *no* liberty interest was at issue in nonjury courtroom shackling. Its analysis was limited to whether there would be inherent prejudice in the mind of the sentencing judge seeing the defendant in shackles as there would be in front of a guilt-phase jury. *Id.* at 103-04.

Likewise, the Eleventh Circuit in *United States* v. *LaFond* held that a defendant wasn't entitled to an individualized shackling determination before a sentencing judge. 783 F.3d 1216, 1225 (11th Cir. 2015). The court in *LaFond* went further than *Zuber*, saying that "the rule against shackling pertains only to a

innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom.[9] *See, e.g.*, *Gonzalez*, 341 F.3d at 900; *Duckett*, 67 F.3d at 748; *Spain*, 883 F.2d at 721, 728. Courts cannot delegate this constitutional question to those who provide security, such as the U.S. Marshals Service. Nor can courts institute routine

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jury trial." *Id.* In reaching this conclusion, the Eleventh Circuit disregarded the common law rule embodied in our Constitution that protects an individual from unwarranted shackles in the courtroom, regardless of the presence of a jury. *See infra* pp. 25-31. Moreover, it failed to consider the three essential interests that *Deck* identified for deciding shackling cases.

[9] An individual determination cannot resemble what the Southern District judges did here. Courts may not incorporate by reference previous justifications in a general fashion, nor may they refuse to allow defendants to make objections or create evidentiary records. And they cannot flip the presumption against shackling by requiring that the defendant come up with reasons to be *un*shackled.

The Southern District's reliance on postdeprivation process is unconstitutional not only because it often results in no opportunity to be heard at all, but also because many judges failed to exercise discretion when faced with inappropriate shackling. These judges shackled a blind man, a woman in a wheelchair with "dire and deteriorating" health and a woman with a broken wrist. And despite the policy providing that shackles wouldn't be used at sentencing hearings without specific security information showing an individualized need, the defendant in the wheelchair was also shackled at her sentencing hearing. *See supra* p. 7. The hearing transcript indicates that no evidence of such specific security information was introduced. Routine shackling subject to postdeprivation review is plainly insufficient to protect this fundamental constitutional right.

shackling policies reflecting a presumption that shackles are necessary in every case.[10]

This right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty. The principle isn't limited to juries or trial proceedings. It includes the perception of any person who may walk into a public courtroom, as well as those of the jury, the judge and court personnel. A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain. *See Zuber*, 118 F.3d at 106 (Cardamone, J., concurring) ("The fact that the proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles.").

And it's not just about the defendant. The right also maintains courtroom decorum and dignity:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

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[10] We therefore overrule *Howard* to the extent it held that a routine shackling policy largely justified by deference to the U.S. Marshals Service was constitutional.

Deck, 544 U.S. at 631. The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life. A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain gang. Both the defendant and the public have the right to a dignified, inspiring and open court process. Thus, innocent defendants may not be shackled at any point in the courtroom unless there is an individualized showing of need.

2. This right "has deep roots in the common law." *Deck*, 544 U.S. at 626. The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted).

One traditional justification for the right was allowing defendants to try their cases without the distraction of shackles and any attendant physical pain. *See Deck*, 544 U.S. at 626; *see also id.* at 638-39 (Thomas,

J., dissenting).[11] An early commentator noted that defendants should approach the court free of shackles "so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will." *Id.* at 626 (quoting 3 Edward Coke, *Institutes of the Laws of England* 34 (1797)). But the right was also motivated by the desire to protect defendants' dignity:

> [E]very person at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner; as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescous or escape.

2 William Hawkins, *A Treatise of the Pleas of the Crown* 434 (John Curwood, 8th ed. 1824). Still, there were certain situations when the need for security overcame the right to be free of shackles: "[A] defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evi-

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[11] The dissent relies heavily on the give and take between Justice Thomas and the majority on a matter not central to the majority's holding. *See* dissent at 57-58. But the Court has recognized that such byplay is not binding if it does not concern the majority's holding. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013) (dismissing as dictum a contrary statement of law in a previous opinion, explaining that it was merely "contained in a rebuttal to a counterargument").

dent danger of an escape.'" *Deck*, 544 U.S. at 626 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 317 (1769)).

The Supreme Court in *Deck* found that the common law drew a distinction between trial and pretrial proceedings when applying the right because "Blackstone and other English authorities recognized that the rule did not apply at 'the time of arraignment,' or like proceedings before the judge." *Id.* (quoting 4 Blackstone, *Commentaries on the Laws of England* 317) (citing *Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K.B. 1722)). This statement on pretrial proceedings is undoubtedly dictum in a case about shackling at capital sentencing. Persuasive Supreme Court dicta are usually heeded by lower courts. *See United States* v. *Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc). But dicta "ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 627 (1935) (quoting *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.)). The Supreme Court's dictum on pretrial proceedings in *Deck* doesn't control this case because it's contradicted by the very sources on which the Supreme Court relied.[12]

The early commentators didn't draw the bright line between trial and arraignment that the *Deck* Court seemed to believe they did. Coke's discussion of shackling noted that "[i]t is an abuse that prisoners be

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[12] "Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?" *Kirtsaeng*, 133 S. Ct. at 1368.

charged with irons, or put to any pain before they be attainted." 3 Coke, *Institutes of the Laws of England* 34. And Blackstone did *not* recognize that the rule against shackles didn't apply at the time of arraignment or proceedings before a judge. Instead, the language the Court cited and partially quoted said the *opposite*: Shackles at arraignment and pretrial proceedings are acceptable only in situations of escape or danger.

> The prisoner is to be called to the bar by his name; and it is laid down in our an[c]ient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A.D. 1722[,] a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.

4 Blackstone, *Commentaries on the Laws of England* 317. Shackles at arraignment and trial are different, as Blackstone noted, but only because shackles are more easily justified at the former, which was demonstrated by Layer's case.

Layer's case, relied on by both Blackstone and the Supreme Court, began with Layer's appeal to be unshackled at his arraignment. *The Trial of Christopher Layer, esq; at the King's-Bench for High-Treason, Nov. 21. 1722*, in 6 *A Complete Collection of State-Trials, and Proceedings Upon High-Treason* 229-32 (2d ed. 1730). The government justified the shackles on the ground that Layer had previously attempted to

escape. *Id.* Layer's lawyer objected strongly, explaining that "by Law he ought not to be called upon, even to plead, till his Fetters are off." *Id.* at 231. He argued that shackles not only caused physical and mental "uneasiness," but also that they besmirched the décorum of the court:

> [S]omething of the Dignity of the Court might be considered in this Matter, for a Court of Justice, the highest in the Kingdom for criminal Matters, where the King himself is supposed to be personally present, to have a Man plead for his Life before them in Chains, seems to be very unsuitable. He is now before the same awful and just Tribunal which he will be before when he is tried, and why not therefore without Chains as well now as then . . . ?

Id. While Layer was ultimately unsuccessful, his argument demonstrates that shackling at arraignment was not a standard practice, or even permissible, absent a demonstrated need.

The dissent struggles manfully against the plain language of Layer's case and Blackstone. *See* dissent at 58-62. It claims to "follow the Supreme Court's interpretation" of Layer's case by pointing to *Deck*, *id.* at 61-62 n.13, but nowhere does the *Deck* majority analyze the case. We merely repeat what Blackstone and Layer's case provide—that shackling at arraignment was allowed after a showing of need. Layer's case applied the exception to Blackstone's basic rule: A prisoner "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 Blackstone, *Commentaries on the Laws of England* 317. There's nothing to indicate

that shackles were used at arraignments more generally without a particular reason; Layer's case suggests the contrary.

Early American courts "traditionally followed Blackstone's 'ancient' English rule." *Deck*, 544 U.S. at 626-27 (collecting cases). *Blair* v. *Commonwealth*, relying on a legal encyclopedia, explained that courts followed "the common-law rule" that "shackling defendant[s] during arraignment, during the calling and examination of the jurors, or at any time during the trial, except in extreme cases to prevent escape or to protect the bystanders from the danger of defendant's attack, [was] reversible error." 188 S.W. 390, 393 (Ky. Ct. App. 1916) (internal quotation marks omitted) (quoting 12 William Mack, *Cyclopedia of Law and Procedure* 529 (1904)). Likewise, *Rainey* v. *State* quoted Bishop's authoritative treatise to note that "'the rule [against shackling] at arraignment where only a plea is required is less strict'" than the rule at trial. 20 Tex. App. 455, 472 (1886) (quoting 1 Joel Prentiss Bishop, *Criminal Procedure* § 955 (3d ed. 1880)). Contrary to the dissent's belief, that the rule "is less strict" doesn't mean it didn't exist at all.[13] Bishop understood the common law rule just as we do: "[I]f a keeper deems it necessary," then the general rule that the defendant "should not be in irons" at arraignment could be relaxed.

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[13] The dissent fails to engage with these cases and cites no secondary sources with the view of shackling at arraignment that it espouses. Authoritative secondary sources such as Bishop's treatise and Mack's encyclopedia provide us with a panorama of the law as it was generally understood and applied by a majority of courts at the time.

1 Bishop, *Criminal Procedure* § 731; *see also Parker* v. *Territory*, 52 P. 361, 363 (Ariz. 1898) ("'A person charged with a public offense shall not before conviction be subjected to any more restraint than is necessary for his detention to answer the charge,'—which is but the common-law and constitutional right of a prisoner embodied in the statute." (citation omitted)). Thus, we have a tradition dating from time out of mind that defendants will appear in court prior to their conviction as free men with their heads held high.

3. The government contends that individualized determinations are required only before shackles are used in the jury's presence. Otherwise, it argues, the right is sufficiently protected by considering generally applicable security concerns, deferring to the U.S. Marshals Service and leaving the rest to individual judges' discretion. The government also asks us to analyze this case under *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

But *Bell* dealt with pretrial detention facilities, not courtrooms.[14] Those facilities are meant to restrain and keep order, not dispense justice. They are a mere step away from detention in prison. We emphatically reject the idea that courtrooms are (or should be) perceived as places of restraint and punishment, or that courtrooms should be governed exclusively by the type of safety considerations that justify detention facility

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[14] The dissent expands the scope of *Bell* to the courtroom by claiming that "[t]he government's interest in securing [pretrial detainees'] presence at trial and maintaining order and security . . . remains the same regardless of the location." Dissent at 65. Location matters, however. The courtroom is not a pretrial detention facility.

policies. We must make every reasonable effort to avoid the appearance that courts are merely the frontispiece of prisons.

We have a long tradition of giving correctional officials a wide berth in maintaining security within their own facilities.[15] *See id.* at 540 n.23. But we don't have a tradition of deferring to correctional or law enforcement officers as to the treatment of individuals appearing in public courtrooms. In the courtroom, law enforcement officers have no business proposing policies for the treatment of parties as a class. Insofar as they have information pertaining to particular defendants, they may, of course, bring it to the court's attention. But a blanket policy applied to all defendants infuses the courtroom with a prison atmosphere. The Marshals Service should not have proposed it and the judges should not have paid heed.

We must take seriously how we treat individuals who come into contact with our criminal justice system —from how our police interact with them on the street to how they appear in the courtroom. How the justice system treats people in these public settings matters for the public's perception, including that of the defendant. Practices like routine shackling and "perp walks" are inconsistent with our constitutional presumption that people who have not been convicted of a crime are innocent until proven otherwise. That's why we must examine these practices more skeptically than those

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[15] We need not consider the application of *Bell* to holding cells or transportation between detention centers and the courtroom, which are beyond the scope of this case.

deployed in an institutional setting like *Bell*. *See, e.g.*, *Deck*, 544 U.S. at 634 (holding that a defendant's Fifth Amendment rights were violated by visible shackling before a jury at capital sentencing proceedings); *Lauro* v. *Charles*, 219 F.3d 202, 212-13 (2d Cir. 2000) (holding that a defendant's Fourth Amendment rights were violated by a staged and filmed perp walk done without a legitimate law enforcement reason). We must treat people with respect and dignity even though they are suspected of a crime.

* * *

The Constitution enshrines a fundamental right to be free of unwarranted restraints. Thus, we hold that if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant. Courts must decide whether the stated need for security outweighs the infringement on a defendant's right. This decision cannot be deferred to security providers or presumptively answered by routine policies. All of these requirements apply regardless of a jury's presence or whether it's a pretrial, trial or sentencing proceeding. Criminal defendants, like any other party appearing in court, are entitled to enter the courtroom with their heads held high.

The policy that defendants challenged here isn't presently in effect. Thus, although we hold that policy to be unconstitutional, we withhold the issuance of a formal writ of mandamus at this time.

DENIED.

SCHROEDER, Circuit Judge, concurring:

I fully concur in Judge Kozinski's opinion with its comprehensive historical analysis. I write separately only to offer a brief comment about Judge Ikuta's lengthy, well written dissent.

In addition to noting my disagreement with the dissent's interpretation of common law and Supreme Court authority, I also observe that the dissent unfortunately lacks sensitivity to two of the most important components of our system of justice. The first is the dignity with which court proceedings should be conducted. The dissent thus ignores the degradation of human beings who stand before a court in chains without having been convicted, or in many instances, without even having been formally charged with any crime. Second, the dissent lacks sensitivity to the proper role of the judges as opposed to the Marshals Service in determining how a courtroom should be run. Thus the dissent accepts the data provided by the Marshals Service even though no district court judge has ever made any finding of fact concerning the data's accuracy or whether it provides a good reason for this unprecedented mass shackling.

Our court today correctly upholds the proper role of the judges, as opposed to the jailors, in the courtroom.

IKUTA, Circuit Judge, with whom O'SCANNLAIN, SILVERMAN, GRABER, and CALLAHAN, Circuit Judges, join, dissenting:

Far removed from the potential dangers of a trial court, the majority holds that criminal defendants whose cases are now moot can use their individual appeals as vehicles to invalidate the prospective application of a federal district court's policy of deferring to the United States Marshals Service on questions of courtroom security. In reaching this conclusion, the majority ignores Article III's limitations on federal judicial power, conjures up an unsupported and unprecedented exception to mootness, chastises district judges for following our case law, brushes aside inconvenient Supreme Court reasoning, creates an unjustifiable circuit split, and discovers a one-size-fits-all courtroom security policy in the Constitution. We should not be hearing this case at all, much less using it to announce a sweeping and unfounded new constitutional rule with potentially grave consequences for state and federal courthouses throughout this circuit. I dissent.

I

In July 2013, the United States Marshals Service, pursuant to its congressional charge "to provide for the security . . . of the United States District Courts," 28 U.S.C. § 566(a), recommended that the judges of the Southern District of California allow the Marshals Service to produce all in-custody defendants in full restraints for non-jury proceedings. The Marshals Service based this recommendation on several factors. For one, a number of dangerous incidents had recently occurred in the courthouse. In 2013 alone, there were

two separate inmate-on-inmate assaults inside courtrooms; an inmate was stabbed in the face as a result of one of those assaults. The Marshals Service also discovered that several detainees had armed themselves with homemade weapons in holding cells, including a detainee with no violent background who attempted to smuggle a razor blade in his shoe.

Second, the Marshals Service determined that it lacked sufficient information to predict which detainees would present a danger. In many cases, detainees with no history of violence, or those who were charged with non-violent offenses, engaged in violent acts while in custody. For instance, in 2013 there were seven detainee-on-staff assaults in the Southern District of California; six of the offenders had been charged with non-violent offenses, and five of those six had no histories of violence. Moreover, the Marshals Service can access only limited criminal background information regarding detainees who are not residents of the United States, and the Southern District of California hears an unusually high number of cases involving such detainees. Accordingly, the Marshals Service concluded that it had little ability to predict which detainees would present a danger.

The Marshals Service also noted logistical concerns that enhanced the potential danger arising from the large number of criminal defendants cycling through the courthouse. In the years leading up to the policy's implementation, the Marshals Service produced approximately 40,000 in-custody defendants for court appearances, with an average of over 200 defendants moving through district cellblocks per day. The high

volume of in-custody criminal defendants, the close quarters in the courtrooms used by magistrate judges, the configurations of the courtrooms used by district judges, and budgetary constraints that forced the Marshals Service to reduce the allocation of resources to courtroom protection duties all contributed to heightened security concerns. In short, the Marshals Service's security recommendation arose from a confluence of factors, many of which were specific to the Southern District of California.

After consulting with the United States Attorney's Office, the Federal Defenders of San Diego, and a Criminal Justice Act panel representative, the district court concluded that it should defer to the Marshals Service's recommendation on this courtroom security issue, with two exceptions. First, the district court declined to adopt the Marshals Service's recommendation with respect to guilty plea colloquies and sentencing hearings. Second, the district court reserved the right of any individual judge to opt out of the policy. In deciding to implement the Marshals Service's recommendation, the district court relied on our decision in *United States v. Howard*, 480 F.3d 1005, 1013 (9th Cir. 2007), and on the Second Circuit's decision in *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997), each of which held that deference to the Marshals Service's judgment regarding the use of restraints on detainees during non-jury pretrial proceedings did not violate the detainees' constitutional rights.

Challenges to the new policy came quickly, including from the defendants now before us on appeal. In October 2013, Jasmin Morales made her initial appear-

ance before a magistrate judge in full restraints pursuant to the new security policy. Morales had been charged with felony importation of a controlled substance, in violation of 21 U.S.C. §§ 952 and 960. Her counsel moved to have the restraints removed during the pretrial proceedings, but the magistrate judge denied the motion. While her criminal case was moving forward, Morales filed an emergency motion with the district court challenging the pretrial restraint policy. A district court judge denied that motion, and her counsel filed a notice of appeal in November 2013. A few months later, in April 2014, Morales pleaded guilty. The district court imposed a sentence of eighteen months imprisonment and three years of supervised release and entered a final judgment on June 19, 2014. At that point, Morales's criminal case before the district court was over.[1] The other defendants whose appeals are before us—Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring—have similar stories.[2]

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[1] While Morales could appear in federal court again on a supervised release violation, she would not appear as a pretrial detainee. Rather, she is now "[a] criminal defendant proved guilty" who "does not have the same liberty interests as a free man." *Dist. Atty's Office v. Osborne*, 557 U.S. 52, 68 (2009).

[2] Sanchez-Gomez was charged with felony misuse of a passport in violation of 18 U.S.C. § 1544. He filed an emergency motion (identical to Morales's motion) challenging the restraint policy. The district court denied the motion, and Sanchez-Gomez filed a notice of appeal on November 22, 2013. By December 2013, Sanchez-Gomez had pleaded guilty to the charge; the district court entered a final judgment and imposed five years of probation. Patricio-Guzman filed an identical emergency motion challenging the restraint policy. It was also denied. He pleaded guilty to misde-

This case accordingly comes to us in an odd procedural posture: Each of the four defendants' criminal cases came to a close before we heard their appeals, and the four defendants (represented here by the Federal Defenders of San Diego) are before us challenging only the Marshals Service's prospective use of restraints during pretrial proceedings. They do not seek review of the individual decisions to permit the use of restraints in their cases. They do not seek damages for any injury they incurred due to this policy. Nor do they seek to have their convictions or sentences set aside as a result of any prejudicial effect of the restraint policy. Instead, the Federal Defenders of San Diego, allegedly on behalf of the four defendants, seeks prospective relief for all future pretrial detainees who may have pretrial proceedings in the Southern District of California. The defendants seek this relief even though, as the majority concedes, Maj. op. at 16, they are no longer subject to the challenged policy. In fact, none of these defendants has any reason to step foot in a federal courtroom as a pretrial detainee again. Thus, as the majority acknowledges, these defendants

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meanor illegal entry into the United States, 8 U.S.C. § 1325, and was sentenced to thirty days of imprisonment. Final judgment was entered in his case weeks before he filed a notice of appeal regarding the denial of his motion to have restraints removed during pretrial proceedings. Ring was charged with making an interstate threat in violation of 18 U.S.C. § 875(c). His challenge to the use of pretrial restraints was also denied in November 2013, and he filed an appeal a week later. The district court dismissed the charges against Ring with prejudice on the government's motion in October 2014. We consolidated the appeals brought by each of the defendants.

"are making class-like claims and asking for class-like relief," Maj. op. at 11, but are doing so via their individual criminal cases. The threshold question presented in this case is whether, consistent with Article III of the Constitution, they may do so.

II

Because Morales, Sanchez-Gomez, Patricio-Guzman, and Ring have no ongoing interest in the purely prospective relief they seek, *see* Maj. op. at 16, their appeals are moot unless some exception to the ordinary rules of mootness applies. But neither the Supreme Court nor our precedent has established any applicable exception. The majority implicitly concedes as much by contriving a new exception—the "functional class action," *id.* at 16—in order to rescue these appeals from mootness. Because this theory is inconsistent with Supreme Court precedent and incompatible with Article III's case-or-controversy requirement, the majority's creative effort to sidestep mootness should be rejected.

A

The majority treats Article III's case-or-controversy requirement as a mere obstacle in its path to the merits that can be avoided through calculated maneuvering. But our adherence to this requirement "is essential if federal courts are to function within their constitutional sphere of authority." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The Constitution constrains federal "judicial Power" to nine classes of "Cases" and "Controversies." U.S. Const. art. III, § 2; *Rice*, 404 U.S. at 246. A dispute is not a qualifying case or controversy unless we can afford relief to the parties

before us, *see Rice*, 404 U.S. at 246, and the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461 (2007) (internal quotation marks omitted). Thus, "it is not enough that a dispute was very much alive when suit was filed." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Instead, if a party seeking relief loses a "cognizable interest in the outcome" at any stage of the litigation, *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted), then the matter becomes moot and is "no longer a 'Case' or 'Controversy' for purposes of Article III, . . . [n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013). This constraint on federal judicial power exists, as the majority acknowledges, whether the parties are before the court on an appeal, a petition for a writ of mandamus, or any other means of obtaining relief. Maj. op. at 16. Here, the defendants' claims that the pretrial restraint policy violates the Constitution are moot "because even a favorable decision" would not entitle the defendants to any relief. *Murphy*, 455 U.S. at 481. Accordingly, absent some exception to the ordinary rules of mootness, we lack jurisdiction over these consolidated appeals, and they must be dismissed.

The established exceptions to mootness do not give the majority much to work with in its effort to find a live case or controversy. The majority references the exception for cases capable of repetition, yet evading review, Maj. op. at 16-17, but this exception applies

only if "there is a reasonable expectation that the same complaining party will be subject to the same action again," *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (brackets omitted) (quoting *Lewis*, 494 U.S. at 481) (internal alterations omitted). Here, as the majority concedes, "we cannot presume that defendants will be subject to criminal proceedings in the future." Maj. op. at 16; *accord O'Shea v. Littleton*, 414 U.S. 488, 497 (1974); *Cox v. McCarthy*, 829 F.2d 800, 804 n.3 (9th Cir. 1987). Accordingly, the alleged injury is not capable of repetition as to the parties before us, and the "capable of repetition, yet evading review" exception to mootness is inapplicable. *Spencer*, 523 U.S. at 17.

B

Instead of conceding that this case is beyond our power to decide, the majority invents a new "functional class action" exception to mootness. Maj. op. at 16-20. Relying on *Gerstein v. Pugh*, 420 U.S. 103 (1975), a case considering mootness in the class action context, the majority reasons that a case is not moot whenever there is "an ever-refilling but short-lived class" of defendants who are subject to a challenged policy, "[a]t least some members of this functional class continue to suffer the complained-of injury," and most of the members are represented by zealous advocates. Maj. op. at 19. But a group of ever-changing individuals with similar concerns (as the majority envisions) does not constitute the sort of class that can avoid mootness. Even when a plaintiff purports to bring an action on behalf of others, the action will become moot when the plaintiff's own claims become moot, unless the plaintiff has used a procedural mechanism, such as class certi-

fication under Rule 23 of the Federal Rules of Civil Procedure, that can produce a class with "an independent legal status" or otherwise effectively joins "additional parties to the action." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013). Without the creation of such a class pursuant to a statute or rule, a group of interested individuals cannot be a party to the action before the court, and therefore the court may not consider their interests in a particular case for purposes of a mootness inquiry. *See id.*

To understand why *Gerstein* is inapposite here, some background is needed to explain how the mootness doctrine applies in the class action context. Rule 23 provides a procedure that allows courts to aggregate the claims of multiple parties. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (stating that a class action is "[t]he aggregation of individual claims in the context of a classwide suit"). Once a class is certified under Rule 23, it "acquires an independent legal status." *Genesis Healthcare*, 133 S. Ct. at 1530. The members of a class are parties to the action and are generally bound by the judgment. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008).

Because a class is comprised of multiple parties to the legal action, a court's mootness inquiry in a class action lawsuit is broader than in traditional litigation on an individual's own behalf. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755-56 (1976) (holding that the interests of "unnamed members of the class" who are entitled to relief may satisfy the case-or-controversy requirement). The named representative of a class must generally have standing at the com-

mencement of an action and when the district court rules on a motion for class certification. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). But even if the named representative's case becomes moot after the district court has ruled on a motion for class certification, the case itself is not moot so long as at least one member of the putative class has a live interest. *See, e.g., id.* (class action not moot when named representative's claim becomes moot after class certification); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (class action not moot when named representative's claim becomes moot after denial of class certification, provided that the class is subsequently certified). This makes sense: A certified class contains parties with ongoing live claims who have an entitlement to relief regardless whether the named representative's case becomes moot after the complaint is filed. *See Franks*, 424 U.S. at 755-57. Of course, if it turns out that the putative class was never actually eligible for certification, then the entire action dies as moot along with the class representative's claim. *Geraghty*, 445 U.S. at 404.

Even if a named representative's claims become moot *before* the district court has ruled on a class certification motion, a class claim may escape mootness under certain circumstances. This is the *Gerstein* rule. As the Supreme Court has explained, *Gerstein* "recognized . . . that 'some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (brackets omitted) (quoting *Geraghty*, 445 U.S.

at 399). Under these circumstances, a judicial decision to certify a class after the named representative's individual claim is moot may relate back to the time the named representative filed the class-action complaint, and the action will not be moot so long as members of the class continue to have a live controversy. *See Gerstein*, 420 U.S. at 110 n.11 (citing *Sosna*, 419 U.S. at 402 n.11).

In *Gerstein*, two pretrial detainees sued assorted county officials on behalf of a class of pretrial detainees under 42 U.S.C. § 1983 in order to challenge Florida's practice of not providing detainees with a timely probable cause hearing. *Id.* at 106-07. By the time the case reached the Supreme Court, the named representatives had been convicted, and it was not clear whether their individual claims had become moot before or after the district court certified the class. *Id.* at 110 n.11. Given the transitory nature of pretrial custody, the clear existence of a class, and the class's representation by counsel with similarly situated clients, the Supreme Court held that the class action was not moot even if the named representatives' claims expired before certification. *Id.* "In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52. As *Gerstein* illustrates, the "relation back" doctrine serves a very particular purpose. Specifically, in inherently transitory situations, the Court deems class certification to have occurred at the time the named representative filed the complaint with class allegations, at which time the named representative's claims were live. *See* 1 William

B. Rubenstein et al., *Newberg on Class Actions* § 2:13 at 123 (5th ed. 2011). Because the named representative's claims therefore constructively became moot *after* the class's certification, the rule that a class action does not become moot in such circumstances applies. *See id.* at 123-24.

The Supreme Court later explained the limits of the Rule 23 mootness doctrine in considering its applicability to a collective action under the Fair Labor Standards Act (FLSA). The FLSA allows employees to bring a collective action on behalf of "other employees similarly situated," but employees do not become parties to the action unless they elect to opt into it. 29 U.S.C. § 216(b). In *Genesis Healthcare*, the named plaintiff's case became moot before the district court had "conditionally certified" the action,[3] so no other employees had yet opted into the collective action. 133 S. Ct. at 1530. The district court therefore dismissed the lawsuit as moot. *Id.* at 1527. The Third Circuit reversed, holding that the collective action was not moot because, if the employee were subsequently successful in obtaining conditional certification, the district court should "relate the certification motion back to the date on which respondent filed her complaint." *Id.* at 1528.

The Supreme Court disagreed. Under § 216(b), approval of a plaintiff's conditional certification motion "does not produce a class with an independent legal

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[3] *Genesis Healthcare* explained that courts adopted class action terminology, such as "conditional certification," in the FLSA context "to describe the process of joining co-plaintiffs under 29 U.S.C. § 216(b)." 133 S. Ct. at 1527 n.1.

status, or join additional parties to the action," unlike class action certification under Rule 23. *Id.* at 1530. Rather, "[t]he sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Id.* (citation omitted). The Court concluded that, even if the original plaintiff "were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness." *Id.* In other words, because no claimants had opted into the collective action, a court could not consider their interests in determining whether the plaintiff's suit was moot.

Relying on *Gerstein*, the plaintiff in *Genesis Healthcare* argued that in "inherently transitory" cases, a court could give the plaintiff an opportunity to complete the § 216(b) collective action process. *Id.* at 1530-31. If the court granted the conditional certification and employees subsequently joined the collective action, the plaintiff argued, the court should then "relate back" this successful creation of a collective action to the date the original plaintiff filed the complaint. *Id.* The Court did not rule on this suggestion, however, because the plaintiff's action in that case was not transitory in nature. *Id.* at 1531.[4] But even

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[4] Because *Genesis Healthcare* rejected the plaintiff's argument on this ground, it provides no support for the majority's extension of the relation back doctrine to a criminal defendant's claim within his or her criminal case. Contrary to the majority's suggestion that the Court's silence equals permission, Maj. op. at 18-19, *Genesis Healthcare* consistently refers to the relation back doctrine as applying only to class actions. 133 S. Ct. at 1530-31.

this argument rested on the proposition that, at some point in time, multiple plaintiffs with live cases and controversies would be parties to the action before the court, which would overcome the mootness of the original plaintiff's claim.

As the Supreme Court's cases make clear, a necessary prerequisite to applying the mootness doctrine applicable to Rule 23 class actions is the existence of a procedural mechanism, such as Rule 23 or perhaps § 216(b), that allows a court to aggregate the claims of multiple potential claimants and make them parties to the legal action. *See id.* at 1530 (stating that the "essential" aspect of *Sosna* and its progeny "was the fact that a putative class action acquires an independent legal status once it is certified"). Contrary to the majority's "functional class action" theory, it is not enough for a party to assert an inherently transitory claim on behalf of others; there must be a statutory or procedural mechanism that aggregates their claims before the court. *See id.* (characterizing the "line of cases" of which *Gerstein* is a part as applying to "an 'inherently transitory' class-action claim," not to all inherently transitory claims). Indeed, the Supreme Court has never suggested that "unjoined claimants" could prevent the named plaintiff's case from becoming moot. *See id.* at 1531. For example, even though a collective action under the FLSA shares certain features of a class action, the class action mootness rules cannot apply unless and until the collective action includes the interests of other employees who have joined the action. *See id.* at 1530.

The majority's "functional class action" theory cannot create a class that has an independent legal status, whether under Rule 23 or otherwise. Nor does it have the effect of joining any additional criminal defendants as parties to this action. Accordingly, there are no parties before the court with a live case or controversy who could prevent the action from becoming moot. *Gerstein* merely allows a court that certifies a class to relate the existence of the class back to an earlier point in time, when a named party had a live claim. *See id.* at 1530-31. Because there is no class action counterpart in the Federal Rules of Criminal Procedure, nor an analogous means of aggregating multiple criminal defendants for class-wide resolution of common claims in the context of federal prosecutions, there is nothing a court can "relate back" after a criminal defendant's individual claim becomes moot. Accordingly, we must apply "the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). The majority's reliance on *Gerstein* is therefore to no avail. Although criminal defendants could bring civil actions as a class under Rule 23, *cf. Gerstein*, 420 U.S. at 106-07, a defendant in a criminal prosecution cannot, through his or her individual case, represent and bind other criminal defendants.

The majority argues that "the rule in *Gerstein* doesn't turn on the presence of a procedural device like Rule 23," but instead is a free-floating means of "resolv[ing] the problem of inherently transitory claims while ensuring there is a live controversy to which the court can provide relief." Maj. op. at 18. To the extent

the majority means that a federal court can decide a moot claim merely because it is transitory, the majority's theory is clearly contrary to the Constitution's case-or-controversy requirement. *See Murphy*, 455 U.S. at 481-82 (holding, in a post-*Gerstein* case, that a pretrial detainee's individual transitory claim became moot "once he was convicted"). Rather, the Supreme Court has been careful to require a live case or controversy pending before the court through a class action that aggregates the claims of multiple parties. *See, e.g.*, *Genesis Healthcare*, 133 S. Ct. at 1530-31 (characterizing the "line of cases" of which *Gerstein* is a part as applying to "class-action claim[s]"); *McLaughlin*, 500 U.S. at 51-52 (applying *Gerstein* and holding "that *by obtaining class certification*, plaintiffs preserved the merits of the controversy for our review" (emphasis added)); *cf. Murphy*, 455 U.S. at 481-84 (implicitly rejecting the view expressed by the dissenting justice that, under *Gerstein*, "the formalities of class certification are unnecessary," *id.* at 486 n.3). A class action's aggregation of claims solves the problem of inherently transitory claims because, as long as at least one member of the class has a live claim, a federal court will have jurisdiction to resolve it.

Accordingly, contrary to the majority's contentions, the rules for mootness in the class action context do not apply to the separate actions brought by Morales, Sanchez-Gomez, Patricio-Guzman, and Ring. Indeed, the majority's reasoning on this point is even weaker than the plaintiff's arguments in *Genesis Healthcare*. In that case the plaintiff at least made allegations pursuant to a federal statute that allowed collective action.

Genesis Healthcare, 133 S. Ct. at 1527. Here, the criminal defendants did not seek any class or collective status, nor did the defendants even raise such an issue before the district court or to us. At best, one might suggest (as the majority does) that the presence of the Federal Defenders of San Diego as counsel binds the parties together. Maj. op. at 19. But not only do the federal public defenders lack the capacity to aggregate their clients' claims into an independent class, Congress has also declined to allow federal public defenders to bring civil rights claims on behalf of criminal defendants. *See* 18 U.S.C. § 3006A(a) (limiting the scope of representation); *id.* § 3006A(g)(2)(A) (restricting federal public defenders from "engag[ing] in the private practice of law"). Beyond constituting a misapplication of Supreme Court precedent, the so-called "functional class action" devised by the majority allows the federal public defenders to make an end-run around this statutory limitation by bringing the functional equivalent of a civil rights class action under the guise of a criminal appeal, without ever meeting (or even attempting to meet) the requirements of Rule 23. Thus, the majority errs on all fronts: it contravenes the Constitution, a relevant federal statute, and federal procedural rules.[5]

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[5] Contrary to the majority's argument, our "supervisory mandamus role" does not give us any authority to address moot claims. Maj. op. at 19. As the majority itself acknowledges, "[s]upervisory mandamus cases require live controversies even when we don't order a lower court to take or refrain from a specific action." Maj. op. at 15 (citing *In re United States*, 791 F.3d 945, 952 (9th Cir. 2015)). Indeed, each supervisory mandamus case that the majority cites

In addition to its misplaced reliance on *Gerstein* to support its "functional class action" theory, the majority's reliance on *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003), and *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007), Maj. op. at 17, is equally erroneous. *Oregon Advocacy Center* stands for the unremarkable proposition that a federally authorized organization established to represent the rights of people with disabilities has associational standing to bring a challenge on behalf of mentally incapacitated defendants. 322 F.3d at 1116. That case was not moot because the organization was challenging an ongoing policy causing ongoing harm to the organization's constituents. *Id.* at 1118. There is no such organization in our case; rather, the only organization involved in this appeal, the federal public defenders, is precluded from bringing civil actions, *see* 18 U.S.C. § 3006A(a), (g)(2)(A), a stark contrast to the organization in *Oregon*

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involved a live Article III case or controversy. *Will v. United States*, 389 U.S. 90, 91 (1967) (ongoing criminal prosecution for tax evasion); *Schlagenhauf v. Holder*, 379 U.S. 104, 106-09 (1964) (ongoing diversity personal injury suit); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251-54 (1957) (ongoing antitrust suit). It is true that the Supreme Court's decisions in these cases constituted binding precedent and therefore affected persons who were not before the court; this is the nature of our federal judicial system. But an opinion that "addresses the harm of a district court policy affecting a huge class of persons that aren't parties to the mandamus petition" in a moot case is just an advisory opinion, Maj. op. at 19, and "[t]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)).

Advocacy Center, which Congress had authorized to bring such lawsuits. 322 F.3d at 1113.

Nor does *Howard* provide support. *Howard* erroneously relied on *Oregon Advocacy Center* for the proposition that a case is not moot under the "capable of repetition, yet evading review" doctrine "when the defendants are challenging an ongoing government policy."[6] 480 F.3d at 1010. As explained above, this is an erroneous reading of the case, which involved associational standing. Moreover, *Howard*'s ruling is contrary to Supreme Court precedent, which limits the "capable of repetition, yet evading review" exception to cases in which there is "a reasonable expectation that the same complaining party will be subject to the same action again."[7] *Spencer*, 523 U.S. at 17 (internal quotation marks and brackets omitted). The majority

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[6] *Howard*'s reliance on a case from the D.C. Circuit for the same proposition is equally mistaken. *See Howard*, 480 F.3d at 1010 (citing *Ukrainian-Am. Bar Ass'n v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990)). Like *Oregon Advocacy Center*, *Ukrainian-American Bar Ass'n* was a case in which an organization was suing in its own name to challenge an on-going government policy. 893 F.2d at 1376-77. For that reason, *Ukrainian-American Bar Ass'n* was inapposite in *Howard*, as it is here.

[7] *Howard*'s treatment of the capable of repetition, yet evading review exception has been rightly criticized elsewhere. *See Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 932 (7th Cir. 2013) (noting that *Howard* and cases following it "shoehorned ongoing policy challenges" into the capable of repetition exception even though "the parties would not otherwise qualify for the exception as articulated doctrinally"). The en banc court should have used this case as a vehicle to overrule *Howard*'s error, not to entrench it further.

correctly acknowledges that this requirement is not met here. Maj. op. at 16. That acknowledgment should have ended this case, not invited the majority's "functional class action" theory.

In short, the criminal defendants here lack a legally cognizable interest in this appeal, and there is no reasonable expectation that they will be subject to the district court's restraint policy again. Nor have these defendants brought a class action under Rule 23 that could be certified, or any equivalent action that produces "a class with an independent legal status" or "join[s] additional parties to the action." *Genesis Healthcare*, 133 S. Ct. at 1530. We cannot create jurisdiction where none exists, but that is precisely what the majority has attempted to do with its novel and unfounded "functional class action" theory. Because there is no pretrial detainee with a live case who is a party to this appeal, this case must be dismissed as moot.

Although this appeal should be dismissed, the district court's policy is not insulated entirely from judicial review. For example, we likely would have jurisdiction over a class action brought by pretrial detainees under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to recover damages from the individuals implementing the restraint policy,[8] or to seek to enjoin the United States Marshal for the district from carrying out the policy. *Cf., e.g., Armstrong v. Exceptional*

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[8] This should not be read to suggest, however, either that a *Bivens* remedy would ultimately be appropriate, or that the government defendants would be unable to avail themselves of qualified immunity or other defenses.

Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (noting that federal courts have long had the equitable power to enjoin unlawful conduct by federal officers); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183 (1938) (similar); *see also* 5 U.S.C. § 702 (waiving sovereign immunity for such claims). Alternatively, the Ninth Circuit could exercise its supervisory powers by issuing appropriate guidance through the judicial council of the circuit. *See* 28 U.S.C. § 332(d)(1). It is unfortunate that the majority does not deem these procedurally sound avenues of redress even worthy of mention.

III

Because each of the defendants' appeals is moot, it is irrelevant whether their appeals are treated as petitions for a writ of mandamus, as the majority does, Maj. op. at 11-14, or as appeals of collateral orders. In either case, we lack jurisdiction under Article III to consider their claims.

Nevertheless, even if this case were not moot, the defendants' appeals do not meet the requirements for granting a writ of supervisory mandamus, as the majority claims. Maj. op. at 13. Even when "the underlying proceeding is a criminal prosecution," the writ may issue only when a district court has engaged in "willful disobedience of the rules laid down by" the Supreme Court, or "adopted a deliberate policy in open defiance of the federal rules." *Will v. United States*, 389 U.S. 90, 96, 100, 102 (1967). Only such "exceptional circumstances amounting to a judicial 'usurpation of

power' will justify the invocation of this extraordinary remedy." *Id.* at 95.[9]

In this case, the district court has not defied a higher court or the federal rules of procedure. Rather, the district court complied with our last word on the matter, *Howard*, 480 F.3d at 1012-14, in which we held that restraining pretrial detainees in proceedings before a judge did not violate due process. The majority therefore oddly equates a good faith effort to follow our case law with "a persistent disregard" for our rulings. *Will*, 389 U.S. at 96. The majority attempts to distinguish *Howard* on the ground that the restraints in that case were not as intrusive as the restraints employed under the district court's policy now under review. Maj. op. at 14 n.6. No doubt the majority has detected a factual distinction between *Howard* and this case, but the district court's failure to anticipate such a distinction (which in any event does not appear to be constitutionally material) is a far cry from "willful disobedience" or "open defiance." *Will*, 389 U.S. at 100, 102. As in *Will*, "the most that can be claimed on this record is that [the district court] may have erred in ruling on matters within [its] jurisdiction." *Id.* at 103-04.

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[9] The majority suggests that because *Will* raised "concerns about speedy trials and double jeopardy" that are not present here, the mandamus principles discussed in *Will* are not applicable. Maj. op. at 14 n.5. But *Will* merely applied the Supreme Court's general mandamus principles that are applicable in civil and criminal cases alike. *See, e.g.*, *La Buy*, 352 U.S. at 257-58 (holding that supervisory mandamus "should be resorted to only in extreme cases" such as where "the Court of Appeals has for years admonished the trial judges" not to engage in a particular practice).

The record here "simply fails to demonstrate the necessity for the drastic remedy employed by" the majority. *Id.* at 104.

IV

Because the individual appeals brought by Morales, Sanchez-Gomez, Patricio-Guzman, and Ring are moot, we should not rule on the merits of their arguments that pretrial detainees have a due process right to be free of bodily restraints in pretrial hearings before only a judge. Nevertheless, after proceeding to address the merits, the majority announces a new rule of constitutional criminal procedure that is contrary to Supreme Court precedent, creates a split with the Second and Eleventh Circuits, and puts trial courts throughout this circuit at risk. These errors warrant brief mention.[10]

A

The question presented on the merits is whether the Constitution precludes placing restraints on detainees during pretrial proceedings before a judge in the absence of a special need. The majority analyzes this

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[10] Judge Schroeder's concurrence faults the analysis that follows as "lack[ing] sensitivity to two of the most important components of our system of justice," the dignity of court proceedings and the proper role of judges in managing their courtrooms. Concurrence at 34. It is the majority, however, that "lacks sensitivity to the proper role of . . . judges" in our constitutional system, *id.*, by contravening the "minimum constitutional mandate" that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally," *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

question under *Deck v. Missouri*, in which the Supreme Court considered "whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution." 544 U.S. 622, 624 (2005). *Deck* determined that a rule precluding the "routine use of visible shackles during the guilt phase" had "deep roots in the common law." *Id.* at 626. In reaching this conclusion, *Deck* considered treatises on the common law, 18th century English cases, state and federal court opinions adhering to the common law rule, and the Court's own prior cases. *Id.* at 626-29. From these authorities, *Deck* concluded that the rule against using visible shackles before a jury was "a principle deeply embedded in the law" and enshrined in the protections of the Fifth and Fourteenth Amendments. *Id.* at 629. Ultimately, *Deck* held that "[t]he considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." *Id.* at 632. In light of a defendant's right to secure a meaningful defense, the need to maintain dignified proceedings, and the concern that visible restraints had the potential to prejudice the jury, the Court concluded that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." *Id.* at 632-33.

If we apply *Deck* to the merits question here, we should begin by asking whether the common law rule identified in *Deck* extends to placing restraints on detainees during pretrial proceedings where there is no jury. *Deck* itself answers that question: "Black-

stone and other English authorities recognized that the rule did not apply at 'the time of arraignment,' or like proceedings before the judge." *Id.* at 626 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 317 (1769) and citing *Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K.B. 1722) (*Layer's Case*)). Instead, *Deck* explained that the rule "was meant to protect defendants appearing at trial before a jury." *Id.* (citing *King v. Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B. 1743)). In other words, there is no rule regarding restraints on pretrial detainees in non-jury proceedings that has "deep roots in the common law." *Id.*

The majority dismisses this conclusion as "undoubtedly dictum" and "contradicted by the very sources on which the Supreme Court relied." Maj. op. at 27. These rationalizations do not hold water.

First, *Deck*'s statement that the common law rule regulating shackling did not apply at arraignments is not mere dictum, as it responds to arguments raised by the dissent about the rule's scope and purpose. Justice Thomas's dissent argued that the purpose of the English common law rule against leaving a criminal defendant in irons for trial was to ensure that the defendant "was not so distracted by physical pain during his trial that he could not defend himself," and accordingly modern restraints (which do not cause pain) "do not violate the principle animating the common-law rule." *Deck*, 544 U.S. at 638, 640 (Thomas, J., dissenting). To support this point, Justice Thomas noted that because a defendant was not required to "play the main role in defending himself" at the arraignment, courts were not concerned about a defendant's being distracted

by pain. *Id.* at 639-40 (Thomas, J., dissenting). Therefore, "the rule against shackling did not extend to arraignment." *Id.* at 639 (Thomas, J., dissenting). In its analysis, the *Deck* majority conceded the dissent's historical point regarding shackling at arraignments, *id.* at 626 (majority opinion), but responded that although "[j]udicial hostility to shackling may once primarily have reflected concern for the suffering," current opinions "have not stressed the need to prevent physical suffering," but have looked at other legal principles, *id.* at 630. In light of this implicit give-and-take between the *Deck* majority and dissent, it is apparent that *Deck*'s conclusion regarding shackling during arraignments is a considered concession of the dissent's historical point. Contrary to the majority, Maj. op. at 26 n.11, *Deck*'s responsive historical analysis is part of its holding, as it bears on *Deck*'s delineation of the scope of the common law rule that constitutes due process under the Constitution. But even if *Deck*'s guidance were dicta, the majority's rejection of the Supreme Court's clear conclusion is contrary to our long established precedent that "Supreme Court dicta have a weight that is greater than ordinary judicial dicta" and therefore "we do not blandly shrug them off." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (internal quotation marks omitted).

Second, *Deck*'s determination on this issue is not contradicted by the historical sources, as the majority seems to believe. Maj. op. at 26-31. In reaching its conclusion that the common law rule applied when the defendant was in the presence of the jury, but not "at

'the time of arraignment,' or like proceedings before the judge," *Deck* undertook an in-depth historical analysis, considering Blackstone's *Commentaries on the Laws of England*, original sources setting forth the rule, *see Layer's Case*, 16 How. St. Tr. at 99; *Waite*, 1 Leach at 36, and state court cases recognizing the distinction that Blackstone drew, *see Parker v. Territory*, 5 Ariz. 283 (1898); *People v. Harrington*, 42 Cal. 165 (1871). *Deck*, 544 U.S. at 626-27. The majority claims that "Blackstone did not recognize that the rule against shackles didn't apply at the time of arraignment or proceedings before a judge," but that "[s]hackles at arraignment and pretrial proceedings are acceptable only in situations of escape or danger." Maj. op. at 28 (emphasis omitted). This is incorrect: Blackstone acknowledged a distinction between arraignment and trial made in *Layer's Case*. While Blackstone stated the general rule that a prisoner "must be brought to the bar without irons, or any manner of shackles or bonds," he then observed that "in *Layer's Case*, A.D. 1722, a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment."[11] 5 William Blackstone & St. George Tucker, *Blackstone's Commentaries with Notes of Reference* 322 (1803).

Moreover, the text of *Layer's Case* better supports Blackstone's analysis. When announcing his decision to keep Layer fettered during his arraignment, the

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[11] William Hawkins noted this same distinction, also in reliance on *Layer's Case*. 2 William Hawkins, *A Treatise on the Pleas of the Crown* 437 (1787).

Lord Chief Justice first rejected Layer's reliance on *Cranburne's Case* for the proposition that restraints were not permitted at arraignments. *Layer*, 16 How. St. Tr. at 100. Instead, the Lord Chief Justice ruled that *Cranburne's Case* governed only those cases "when the party was called upon to plead, and was tried at the same time." *Id.* The Lord Chief Justice then reasoned that the defendant should be free from chains when he comes to trial so he "should have the use of his reason, and all advantages to clear his innocence." *Id.* In pretrial proceedings, however, "he is only called upon to plead by advice of his counsel" and is not to be tried, so there was no reason for "his chains to be taken off this minute, and to be put on again the next," when he is returned to confinement. *Id.* at 100-01. This passage supports Blackstone's analysis, as well as that of the *Deck* majority and dissent; the concern was not with escape, but with the practicalities of removing restraints for a hearing of limited purpose and duration. *See Deck*, 544 U.S. at 626; *id.* at 639 n.2 (Thomas, J., dissenting) ("When arraignment and trial occurred on separate occasions, the defendant could be brought to his arraignment in irons.").

After the decision in *Layer's Case*, the same rule was stated in *King v. Waite*, in which "[t]he prisoner, at the time of his arraignment, desired that his irons might be taken off." 1 Leach 28, 36 (K.B. 1743). The court informed him, however, that it "had no authority for that purpose until the Jury were charged to try him." *Id.* So the prisoner pleaded guilty, "and being put upon his trial, the Court immediately ordered his fetters to be knocked off." *Id.*

As the common law developed in this country, state courts and treatises interpreted *Layer's Case* and other common law sources as *Deck* did, namely as distinguishing the use of restraints during an arraignment from their use during trial. In *Lee v. State*, for example, the Mississippi Supreme Court noted that *Layer's Case* and *Waite's Case* both distinguished between arraignment (where shackles were generally allowed) and trial (where shackles were not allowed except for good cause). 51 Miss. 566, 571 (1875). *Lee* interpreted the Lord Chief Justice's references to Layer's possible escape as relevant only to his decision to reject Layer's motion to have his restraints removed while in confinement. According to *Lee*, the Lord Chief Justice was concerned that granting such a motion "might be an excuse to his keeper if he (the prisoner) should escape." *Id.* And *Lee* concluded that the Lord Chief Justice permitted shackling at arraignment because "it would be to no purpose to insist on [unfettering] for so little a time as the prisoner now had to stand at the bar." *Id.* Other state courts similarly recognized the distinction between arraignment and trial. *See, e.g.*, *State v. Temple*, 92 S.W. 869, 872 (Mo. 1906) (noting that in *Layer's Case*, "it was held that the prisoner might be brought ironed to the bar for arraignment, but that his shackles must be stricken off at the trial," without reference to concerns regarding escape during proceedings); *Rainey v. State*, 20 Tex. App. 455, 472 (1886) (citing a treatise for the proposition that prisoners may not be shackled during trial, except in unusual cases, "[t]hough the rule at arraignment where only a plea is required is less strict"). Indeed, some state courts have interpreted *Layer's Case* as establishing a

new common law rule, in contradistinction to a prior common law rule that defendants were generally not shackled at arraignment. *See, e.g.*, *Harrington*, 42 Cal. at 167 ("[P]rior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape."); *Parker*, 5 Ariz. at 287 (same).[12]

Rather than follow *Deck*, Blackstone, and these early state decisions, the majority provides its own interpretation of *Layer's Case*, arguing that the Lord Chief Justice held Layer in chains only because Layer had previously attempted to escape. Maj. op. at 28-29. As explained above, this is not a persuasive reading of the case.[13] But even if the majority's interpretation of

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[12] The majority makes the strange accusation that this analysis of state court cases is flawed because it "cites no secondary sources." Maj. op. at 30 n.13. The primary sources cited here, however—actual judicial opinions—read *Layer's Case* as Blackstone and *Deck* read them. If secondary sources have derived a different rule, this again suggests, at most, that the common law is ambiguous. It is precisely because of this ambiguity that we should follow the Supreme Court's interpretation in *Deck*, rather than adopt a contrary view that the Court has rejected.

[13] The majority contends that my interpretation of *Layer's Case* "struggles manfully against the plain language of Layer's case and Blackstone." Maj. op. at 29. Rather than struggling—manfully or otherwise—with *Layer's Case*, I would merely follow the Supreme Court's interpretation of *Layer's Case*, which is well supported by the text and relevant primary and secondary sources. As noted above, the Court relied on *Layer's Case* for the proposition that "Blackstone and other English authorities recognized that the rule [against shackling] did not apply at 'the time of arraignment,' or like proceedings before the judge." *Deck*, 544 U.S. at 626. It is

Layer's Case were also plausible, a reasonable difference in interpretations supports (at most) a conclusion that the case is ambiguous, and we should not ignore the Supreme Court's resolution of an ambiguous issue. Even less should we reprimand a district court through mandamus for failing to anticipate that we would do so.

Besides being ill-considered, the majority's decision to ignore Supreme Court direction also creates a circuit split, again contrary to our precedent. *See United States v. Gwaltney*, 790 F.2d 1378, 1388 n.4 (9th Cir. 1986) ("Unnecessary conflicts among the circuits are to be avoided."); *see also United States v. Alexander*, 287 F.3d 811, 820 (9th Cir. 2002) ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits." (quoting *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1988))). In *Zuber*, the Second Circuit held that because juror bias "constitutes the paramount concern" in a physical restraint case, and because judges are assumed not to be prejudiced "by impermissible factors," 118 F.3d at 104, it did not violate due process "for a trial judge (in the absence of the jury) to defer to the judgment of the U.S. Marshals Service without comment or extended colloquy" on the issue of restraints, *id.* at 103 n.2. Thus, the Second Circuit concluded that "the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing." *Id.* at 102. Reaching a similar conclusion,

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the majority that struggles to bypass the Supreme Court's considered statement.

the Eleventh Circuit, after reviewing *Deck*, Blackstone, and *Layer's Case*, held that "the rule against shackling pertains only to a jury trial" and "does not apply to a sentencing hearing before a district judge." *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 213 (2015). The logic of both *Zuber* and *LaFond* is, as the majority recognizes, directly contrary to the rule announced today. Maj. op at 22-23 n.8.

Were we empowered to decide this case, we should join our sister circuits in following *Deck*'s reading of the common law, rather than inventing a new right out of whole cloth. *Deck* establishes that there is no common law rule against the use of restraints during pretrial proceedings. 544 U.S. at 626. Moreover, as indicated in *Zuber*, there is no danger that the presumption of innocence or the dignity of the courtroom is undermined in the eyes of the jury when pretrial detainees appear in restraints before a judge. 118 F.3d at 103 n.2. Nor have the defendants here indicated that the restraints used in their cases interfered with their ability to communicate with their lawyers or participate in their own defenses. *Deck*, 544 U.S. at 631. The rule sought by the defendants has no pedigree, nor does it protect a well-established right. Accordingly, it cannot be "objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)), such that the Due Process Clause requires it, *contra* Maj. op. at 25. The majority's contrary conclusion grows not

from the "deep roots" of the common law, *Deck*, 544 U.S. at 626, but from the majority's own hothouse.

B

Putting aside the majority's mistreatment of *Deck*, the appropriate framework for resolving this claim is provided by *Bell v. Wolfish*. In *Bell*, pretrial detainees brought a class action to challenge the conditions of their confinement at a federal pretrial detention center. 441 U.S. 520, 523 (1979). The district court granted sweeping relief, which the Second Circuit affirmed in large part. *Id.* at 523-24. In reviewing this relief, the Supreme Court set up the framework for analyzing constitutional claims by pretrial detainees challenging their conditions of confinement. Because *Deck* by its terms does not apply to the situation presented here, *Deck*, 544 U.S. at 626, we ought to apply the general framework for pretrial detention claims that *Bell* establishes.

Three of *Bell*'s principles bear mentioning in this case. First, *Bell* teaches us that although "the presumption of innocence plays an important role in our criminal justice system[,] . . . it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." 441 U.S. at 533. Second, *Bell* instructs that pretrial detainment policies "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 548 (quoting *Pell v. Procunier*, 417 U.S. 817, 827

(1974)). This is so even where the officials are "'experts' only by Act of Congress," because pretrial detainment policies are "peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* Finally, *Bell* holds that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, . . . the proper inquiry is whether those conditions amount to punishment of the detainee." *Id.* at 535. Because the government's authority to detain pending trial extends to its ability "to employ devices that are calculated to effectuate this detention," *id.* at 537, when confronted with a particular challenged condition, the question for a court is "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose," *id.* at 538. In the absence of an intent to punish, a pretrial condition of confinement is not a "punishment" if it is "reasonably related to a legitimate governmental objective." *Id.* at 539. By contrast, where a condition is "arbitrary or purposeless," a court may infer that the true purpose of the condition is to punish. *Id.*

The majority dismisses *Bell* as inapplicable because "*Bell* dealt with pretrial detention facilities, not courtrooms," and detention facilities "are meant to restrain and keep order, not dispense justice." Maj. op. at 31. The majority acknowledges that *Bell* may apply beyond the detention facility walls, *see* Maj. op. at 32 n.15, but draws a hard line at the courtroom door, *see* Maj. op. at 31 n.14. Certainly under *Deck*, a pretrial detainee has

additional due process rights when appearing before a jury. But pretrial detainees enjoy no heightened interests when they appear in court outside of the presence of a jury. *Cf. Zuber*, 118 F.3d at 103-04 & n.2. The government's interest in securing their presence at trial and maintaining order and security, however, remains the same regardless of the location. Thus, as in *Bell*, the question is whether these interests justify the government's restriction on the liberty of pretrial detainees.

As explained in *Bell*, the government may restrain detainees to ensure they will be available for trial, 441 U.S. at 539, and may take certain steps necessary to "maintain security and order," *id.* at 540. *Bell*'s central lesson is that the reasonable pursuit of these objectives through restrictions on detainees' liberty interests, without more, does not rise to a constitutional violation. *Id.* at 539. This logic applies beyond the detention facility itself. For example, the government must often ensure that detainees appear at pretrial proceedings. *See* Fed. R. Crim. P. 10 (providing that a defendant must be physically present at arraignment absent an express waiver of his or her right to appear or express consent to video teleconferencing). But even when detainees are outside the walls of a particular detention facility, they are still subject to detention, and the government maintains a compelling interest in securing their ultimate presence for trial. *Cf. Brothers v. Klevenhagen*, 28 F.3d 452, 457 (5th Cir. 1994) (holding that pretrial detainee status "never reverts back" to a greater degree of protection "[u]ntil the detainee is released from custody"). Thus, pretrial detainees

remain detained while they are in a vehicle transporting them to and from the courthouse, in a holding cell in the courthouse, in any outdoor areas, and even in the courtroom itself. *Cf. Beaulieu v. Ludeman*, 690 F.3d 1017, 1031-33 (8th Cir. 2012) (upholding under *Bell* a policy of placing civilly committed detainees in full restraints whenever being transported). In each area, the detainee is subject to reasonable government control aimed at securing his or her presence at trial and his or her orderly and safe interaction with other detainees.

Viewed in this light, the merits of this case would not be difficult, were we empowered to reach it. Because the pretrial detainees are outside the presence of a jury, the majority's rhetoric about the presumption of innocence, Maj. op. at 22, has no place in the analysis. *Bell*, 441 U.S. at 533. Moreover, because there is no allegation that the restraint policy is intended as a punishment, the question is simply whether requiring detainees to wear restraints while attending their pretrial hearings "is reasonably related to a legitimate governmental objective." *Id.* at 539. Here, it clearly is. To the extent the restraints reduce the likelihood of an escape, they further the government's interest in ensuring that detainees will appear at trial. *See id.* Similarly, given the history of detainee-related assaults and weapons smuggling in the Southern District of California, the restraints are reasonably related to the government's interest in maintaining order and safety among its detainees. *Cf. id.* at 540 ("[T]he Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit

drugs reach detainees."). Requiring detainees to appear at pretrial hearings in restraints is therefore reasonably related to the government's valid interests, and the policy is accordingly a constitutionally permissible condition of pretrial confinement. *See id.*

Making this case even simpler, the district court's deference to the Marshals Service, the entity that Congress statutorily charged with providing courtroom security, 28 U.S.C. § 566(a), is consistent with the Marshals Service's role as an expert entity charged with securing courtrooms and managing pretrial detainees during their court appearances. As the expert on courtroom security, the Marshals Service is due "wide-ranging deference" absent "substantial evidence in the record to indicate that the officials have exaggerated their response" to the problems they seek to solve. *Bell*, 441 U.S. at 547, 548. Because there is no substantial evidence on this record that the Marshals Service is punishing detainees by restraining them or otherwise imposing conditions of confinement unrelated to the government's legitimate interests, the challenged policy is not an unconstitutional condition of detention. Accordingly, the district court's deference to the Marshals Service's recommendation does not violate the pretrial detainees' constitutional rights.

To be sure, "district courts have the inherent authority to manage their . . . courtrooms," *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016), and some may choose not to defer to the Marshals Service's recommendation after a careful balancing of the need for safety and security of the courtrooms with the interests of the detainees. These are decisions, however, to be

made by the district courts themselves, taking into account facts specific to their situations, including such factors as the adequacy of staffing by security professionals, the configurations of the courtrooms, and prior experiences. They are not decisions that should be made by appellate jurists far removed from the day-to-day administration of criminal justice.

By creating a blanket constitutional rule in this moot case, the majority not only puts federal district courts at risk, but also restricts the choices that states in this circuit can make to secure detainees without inviting a lawsuit under § 1983.[14] The ramifications of the majority's holding will reach into courthouses of every size and capacity, yet the majority never once pauses to consider the consequences of its one-size-fits-all security decree. Indeed, the majority fails even to consider the evidence on this particular record that the

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[14] State courtrooms may face even greater dangers than federal courthouses. "Federal judges are protected by a dedicated law enforcement agency, the U.S. Marshals Service," but "[m]ost state and local judges are protected by all-purpose local sheriff or police departments." Chuck Weller, *What Judges Should Know about Court-Related Violence*, 53 Judges' J. 28, 30 (2014). Therefore, "[f]ew state and local judges will ever have the level of protection afforded to their federal counterparts." *Id.* Indeed, a mere matter of months ago, a pretrial detainee in Michigan who was handcuffed, but not secured with a belt apparatus that the majority maligns, Maj. op. at 7, managed to disarm a sheriff's deputy, kill two bailiffs, shoot a bystander in the arm, and take hostages. *See* Associated Press, *Sheriff: Inmate who killed 2 at Michigan courthouse was handcuffed*, Chicago Tribune (July 12, 2016), *available at* http://www.chicagotribune.com/news/nationworld/midwest/ct-michigan-courthouse-shooting-20160712-story.html.

Marshals Service is *unable* to make well-founded individual judgments about what threat, if any, a pretrial detainee poses. Instead, the majority lays down the rule that the Marshals Service can either do the impossible (predict risks based on a dearth of predictive information) or sit idly by and suffer an identifiable, compelling harm (violence in the courtroom). The majority's rule therefore fails not only as a matter of law, but also as a matter of common sense.

V

The majority's analysis is wrong at every turn. It contradicts the Supreme Court's rulings on mootness, mandamus, and the merits, and it substitutes the supposed wisdom of the ivory tower for the expertise of the United States Marshals Service and the district courts themselves. Because the four defendants whose criminal appeals are before us have now long since passed through the federal criminal justice system, we should dismiss these appeals as moot, rather than use them as improper vehicles to make a constitutional ruling as sweeping as it is erroneous. I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-50561
D.C. No. 3:13-mj-03928-BLM-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RENE SANCHEZ-GOMEZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Barbara Lynn Major, Magistrate Judge, Presiding

No. 13-50562
D.C. No. 3:13-mj-03882-JMA-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MOISES PATRICIO-GUZMAN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Jan M. Adler, Magistrate Judge, Presiding

No. 13-50566
D.C. No. 3:13-cr-04126-JLS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASMIN ISABEL MORALES, AKA JASMIN MORALES, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

No. 13-50571
D.C. No. 3:13-cr-03876-MMA-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARK WILLIAM RING, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Filed: Aug. 25, 2015

OPINION

Before: MARY M. SCHROEDER and JACQUELINE H. NGUYEN, Circuit Judges, and JACK ZOUHARY, District Judge.*

SCHROEDER, Circuit Judge:

The judges of the Southern District of California have deferred to the recommendation of the United States Marshals to place pretrial detainees in full shackle restraints for most appearances before a judge, including arraignments, unless a judge specifically requests the restraints be removed in a particular case. The deferral policy was adopted after some security incidents, coupled with understaffing, created strains in the ability of the Marshals Service to provide adequate security for the newly opened San Diego courthouse. Several defendants have unsuccessfully challenged the policy in the district court and now appeal.

Our circuit's leading case requires adequate justification for a generalized policy authorizing the pretrial use of shackles. *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007). On this record, the Southern District has failed to provide adequate justification for its restrictive shackling policy. We therefore vacate and remand for further proceedings.

BACKGROUND

On March 12, 2013, the U.S. Marshal for the Southern District of California sent a letter to the Chief Judge of the District requesting that the district consider adopting a policy of producing defendants in full

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

restraints for most non-jury proceedings. Full restraints consist of leg shackles and handcuffs connected to a belly band by a chain approximately 15 inches long. They are also referred to as "five point restraints."

Subsequently, on July 8, 2013, the Marshals Service gave a presentation to all district judges on the need for the policy. The Chief Judge then responded with a letter to the Marshals on October 11, 2013, announcing that the district judges had decided to defer to the Marshals' recommendation. The letter stated that defendants would be produced in full restraints for all non-jury proceedings, with the exception of guilty pleas and sentencing hearings, and subject to the rule that any judge may ask the Marshals to remove the restraints in a particular case.

The new policy took effect on October 21, 2013, with all defendants appearing in full restraints for non-jury proceedings, subject to the exceptions stated in the October 11 letter. It appears that some individual judges have opted out of the policy.

The Chief Judge's letter made it clear that the policy emanated from the presentation by the Marshals Service highlighting security problems within the district. There is no dispute that the Southern District has a higher volume of criminal defendants than most other districts, that violence among pretrial detainees appears to have increased, and that there have been two incidents of in-court attacks on a fellow prisoner. The Marshals' staffing has not materially increased since 2012, although the Marshals have had to service three courthouses since a new courthouse opened for business that year.

When the new shackling policy was put into place, the criminal defendants began to request to be unshackled, and several appealed denials by the magistrate judge. The Federal Defenders then filed a challenge to the policy on behalf of three defendants whom they represented, Rene Sanchez-Gomez, Moises Patricio-Guzman and Jasmin Isabel Morales, and, in their consolidated cases, the district judge denied the challenge. The judge in a fourth case, that of Mark William Ring, ruled similarly, and all four cases are consolidated in this appeal. We have previously ruled that we have appellate jurisdiction in similar circumstances. *See Howard*, 480 F.3d at 1011. Although these appellants are no longer detained, the case is not moot. *See id.* at 1009-10. Any constitutional harm caused by shackling a defendant at non-jury proceedings is likely to be repeated yet will not last long enough to be judicially reviewed; thus, the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review" applies. *See id.*

DISCUSSION

I. General Legal Principles

The Supreme Court has formulated rules for when shackling an individual defendant is permitted in the context of jury proceedings, but has not considered a policy, such as the Southern District's, which applies only in proceedings before a judge. The Supreme Court's most recent decision regarding shackling, *Deck v. Missouri*, identified three fundamental legal principles adversely affected by the use of shackling. 544 U.S. 622, 630-31 (2005). These principles are: (1) the presumption of innocence until proven guilty, a presump-

tion that is undermined by shackling before a jury; (2) the right to counsel, which shackles can hinder by interfering with a defendant's ability to communicate with his lawyer and by humiliating and distracting a defendant, potentially impairing his ability to participate in his own defense; and (3) the need for a dignified and decorous judicial process, which may be affronted by the routine use of shackles. *Id.*

Deck dealt with shackling in the presence of a jury, and the government stresses that fact in defending this shackling policy. The government relies upon the following passage:

> *The law has long forbidden routine use of visible shackles* during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.
>
> This rule has deep roots in the common law . . . . Blackstone and other English authorities recognized that *the rule did not apply at "the time of arraignment," or like proceedings before the judge.* Blackstone, *supra*, at 317; *see also Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K.B. 1722). It was meant to protect defendants appearing at trial before a jury. *See King v. Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B. 1743) ("[B]eing put upon his trial, the Court immediately ordered [the defendant's] fetters to be knocked off").

Id. at 626 (emphases added).

This passage in *Deck*, however, does not support the government's position that there are no limits on the use of shackles before a judge. We agree that a policy

that permits routine use of shackles is not "forbidden" in non-jury proceedings under the Fifth Amendment's Due Process Clause; it does not follow, however, that under our precedent shackles may always be used routinely before a judge without any justification or showing of necessity. We have ruled that such a generalized shackling policy must rest on an "adequate justification of its necessity." *Howard*, 480 F.3d at 1008. We therefore consider whether the Southern District's policy meets that standard.

II. Our Circuit's Decision In *Howard*

Much of the dispute between the parties in this case appears to center on our decision in *Howard*, the only case involving pretrial shackling. In *Howard* we considered a policy authorizing use of leg shackles during appearances before a magistrate judge in the Roybal Courthouse in Los Angeles. We did not reach the question of whether due process requires an individualized determination in a jury proceeding, because we were dealing with non-jury proceedings. We did recognize that the adoption of a general shackling policy in a non-jury setting must be justified. After examining both the extent of the policy and the asserted need for the policy, we held that the policy was adopted "with an adequate justification of its necessity." *Id.* at 1008.

The government contends that *Howard* authorizes the general policy at issue here, a policy of using full restraints during most appearances before a judge. *Howard* does not do that. This policy is more restrictive of defendants' movement, applies more broadly, and was adopted with less judicial consideration of its justification than the policy in *Howard*.

The policy in *Howard* authorized only leg shackles, while this policy authorizes full five point shackles. The policy in *Howard* applied only at first appearances, while the policy in the Southern District applies to a wide range of non-jury proceedings. The policy in *Howard* applied only before magistrate judges; this policy applies to proceedings before both magistrate and district judges. Because the shackling in this case is more burdensome and used more frequently than in *Howard*, it carries a greater risk of impeding the ability of defendants to participate in their defense and communicate with their counsel. The shackles at issue here are also a greater affront to the dignity and decorum of the proceedings, because the shackles themselves are more conspicuous and are used at many different stages of a criminal case. This shackling policy thus carries a greater risk of interfering with a defendant's constitutional rights.

Accordingly, we believe the Southern District must demonstrate a stronger justification for this policy's necessity than was demonstrated in *Howard*. Although both policies were adopted after consultation with the Marshals, the deference by the judges to the financial burdens and staffing issues of the Marshals in the Southern District is one of the dominant factors in the record before us. This case, in fact, references less justification for the shackling policy than did the record in *Howard*.

The concerns in *Howard* were focused on the nature and location of the proceedings. The primary justification given for that policy was a concern for maintaining security in a particular courtroom, a problem pecu-

liar to the Roybal Courthouse in Los Angeles. *Howard*, 480 F.3d at 1013. We discussed security concerns created by "the Central District's practice of conducting proceedings in a large courtroom on the third floor of the Roybal Courthouse, in the presence of multiple defendants, where the risks of conflict, violence, or escape are heightened." *Id.*

A bit of history is illuminating. The Roybal Courthouse involved in *Howard* was built several decades earlier, and was originally designed not as a standalone courthouse, but as an office building with a few courtrooms. This design is what gave rise to the security problems discussed in *Howard* and was the result of a feud between the General Services Administration and the District Court for the Central District. After the District Court rejected a proposal to move out of their existing courthouse and into an entirely new one, Congress chose instead to incorporate a few additional courtrooms into a planned office building, which became the Roybal Courthouse. *See* William Overend, *No New Courthouse, Roybal Tells Judges*, L.A. Times, Feb. 9, 1985; Overend, *Fight Over 20 New U.S. Courtrooms Flares Up*, L.A. Times, Mar. 31, 1986 ("[T]he Chief U.S. District Judge wants to add . . . courtrooms by building a 14-story tower adjoining the existing courthouse, was told by the General Services Administration that his plan has been rejected by Congress in favor of a proposal to put the new courtrooms in a different building."). The Roybal Courthouse was thus particularly ill-suited to accommodate modern security concerns.

In this case, the government has not demonstrated that the courthouses in the Southern District pose similar problems for security. The record here indicates the Marshals in the Southern District pointed to problems arising from the existence of three courthouses, ostensibly brought about by the 2012 opening of a new, state-of-the-art courthouse which, unlike Roybal, presumably was designed to accommodate modern security concerns.

In its attempt to buttress the need for shackling in this case, the government focuses on several incidents of violence, an asserted change in inmate demographics, and other security factors that it claims lead to an increased risk of violence. Yet the government has not pointed to the causes or magnitude of the asserted increased risk. Nor did the government try to demonstrate to the district judges, or now on appeal, that other less restrictive measures, such as increased staffing, would not suffice.

We do not suggest that judges are necessarily required to document the need for a shackling policy in any particular manner, as for example, with statistics or the infeasibility of less restrictive alternatives. We hold only that in this case, judges should have provided greater justification for adopting such a policy.

In sum, we approved the policy in *Howard* largely because of problems inherent in the Roybal Courthouse's design. No similar design problems have been shown to exist in the Southern District. Moreover, the Southern District's policy is substantially more extensive and restrictive than the one in *Howard*.

Our holding is consistent with that reached by the Second Circuit in *United States v. Zuber*, 118 F.3d 101 (2d. Cir. 1997). In that case, the court upheld the shackling of an individual defendant at a sentencing hearing before the same judge who had presided over the trial. *Id.* at 104. The Second Circuit held that the trial court was not required to conduct an individualized hearing every time a prisoner was brought into court. *Id.* At such a sentencing proceeding, the trial court properly deferred to the "professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances." *Id.* *Zuber* did not involve a blanket pretrial policy of shackling all defendants regardless of the circumstances, but rather approved limited deference to the Marshals' judgment that individual defendants be shackled in particular circumstances. This is a far cry from deferring to the Marshals' request that all defendants be shackled in all appearances before trial.

We therefore hold that a full restraint policy ought to be justified by a commensurate need. It cannot rest primarily on the economic strain of the jailer to provide adequate safeguards. We do not say that a blanket policy of shackling defendants in non-jury proceedings is never permissible; indeed, we approved of one such policy in *Howard*. We merely reiterate what we recognized in *Howard*, that such a policy must be adopted with "adequate justification of its necessity." *Howard*, 480 F.3d at 1008. The record here falls short of that showing.

CONCLUSION

The consolidated orders of the district court are **VACATED** and the matters **REMANDED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Related Case Nos.
13mj3858 BLM (LAB)
13mj3882 JMA (LAB)
13mj3928 BLM (LAB)

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASMINE MORALES, DEFENDANT

UNITED STATES OF AMERICA, PLAINTIFF

v.

MOISES PATRICIO-GUZMAN, DEFENDANT

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE SANCHEZ-GOMEZ, DEFENDANT

[Filed: Nov. 21, 2013]

ORDER DENYING EMERGENCY MOTION TO REVOKE DISTRICT-WIDE POLICY REGARDING SHACKLING OF PRETRIAL DETAINED DEFENDANTS; AND

ORDER DENYING APPEAL OF MAGISTRATE JUDGES' RULING AS TO DEFENDANTS MORALES AND PATRICIO-GUZMAN

Preliminary Statement

In these related cases, three Defendants represented by Federal Defenders of San Diego have challenged a new district court policy, effective October 11, 2013, that generally calls for deference to the U.S. Marshals on matters of courtroom security. The gist of the challenge is to the shackling of prisoners who often appear *en masse* before the magistrate judges during non-jury, pretrial proceedings, and in particular during guilty pleas. Defendants Morales and Patricio-Guzman are also appealing magistrate judges' rulings, pursuant to the Court's policy, denying their requests to be freed from restraints.

The underlying motion is styled "Emergency Motion to Revoke District-Wide Policy Requiring Five-Point Shackling of All Pre-Trial Detained Defendants Appearing in Magistrate & District Court." Individually, the Defendants in these three cases seek to be freed from five-point restraints, but the motion's caption is misleading because there is no policy requiring the shackling of all pretrial detained defendants.

The Court received briefing, and heard argument on Friday, November 15, 2013, at which time the Court denied the motion from the bench. This written order memorializes and supplements that oral decision.

At argument, the Court pointed out that large parts of the Emergency Motion's characterization of the pol-

icy, and framing of the issues, are incorrect. The policy does not, as the Emergency Motion would have it, require that every pretrial detainee **always** be held in five-point restraints when appearing before a judge. Rather, the new policy[1] generally defers decisions regarding the shackling of prisoners in non-jury proceedings to the Marshals, but directs that the Marshals remove arm and hand restraints during guilty pleas and sentencing hearings held before the district judges. Because the magistrate judges are frequently called upon to take guilty pleas from multiple defendants (up to six at a time) and to conduct other *en masse* proceedings, the policy does not direct the Marshals to remove restraints in proceedings before the magistrate judges. However, the policy also specifies that any district or magistrate judge may, in individual cases, direct the Marshals to produce a prisoner without restraints. Moreover, the policy does not prevent defendants from asking a judge to remove the restraints, and in fact judges often accede to the requests. It is conceded that at least one district judge has invoked the exception to order shackles removed in every case before her. The policy does not, of course, apply to proceedings before juries.

The restraints, the parties agree, consist of handcuffs which can be chained to a waist-level "belly chain," as well as leg restraints. The chains on Defendants' feet are between 12 and 18 inches long, which allows them to walk and move their feet around. The re-

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[1] The new policy is described in a letter sent October 11, 2013 by the Chief Judge of the District, to the local U.S. Marshal. (*See* Docket no. 8-1, Ex. H, in case 13mj3928.)

straints can be loosened if they are too tight, and it is conceded judges have ordered them loosened.

Although a portion of the claims may appear to be moot, the Court finds that, as in *United States v. Howard*, 480 F.3d 1005, 1009 (9th Cir. 2007), they fall within the "capable of repetition, yet evading review" exception to mootness.

Defendants' Challenge

Although Defendants argue that their claims arise from principles of substantive due process, the Court finds that they are, in large part, Fourth Amendment claims. Most claims concerning the confinement or restraint of pretrial detainees concern the seizure of their persons, and thus arise under the Fourth Amendment, *see Graham v. Connor*, 490 U.S. 386, 388 (1989) (claims of unreasonable seizure of one's person should be analyzed under the Fourth Amendment's "objective reasonableness" standard and not a substantive due process standard), although claims that a pretrial detainee is being treated punitively are Fourteenth Amendment due process claims. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979). *See also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (discussing substantive due process and Fourth Amendment claims). Claims that a detainees are unfairly prejudiced during proceedings by the way they are presented (*e.g.*, in jailhouse clothing, or shackled) are procedural due process claims. *See Howard*, 480 F.3d at 1012.

Due Process

In *Deck v. Missouri*, 544 U.S. 622, 630-32 (2005), the Supreme Court held that detainees have both a Fifth

and Fourteenth Amendment due process right not to be shackled in front of a jury. The Court emphasized the importance of the presumption of innocence, the right to a meaningful defense, and dignified proceedings, any of which shackles might threaten. Because shackles can be partially or wholly removed if they are interfering with a Defendant's ability to present his defense in some way (*e.g.*, by preventing the Defendant from writing notes or by causing the Defendant pain and confusion), there is no real danger of that here. Furthermore, the policy directs that the Marshals remove hand restraints during guilty pleas and sentencings, when defendants are most likely to need to use their hands or communicate with counsel, unless the Marshals are aware of a need to keep a particular defendant restrained. (*See* Chief Judge's letter at 2.)

Defendants also argue that shackling may lead to subtle or even subconscious judicial bias, but in pressing this argument they are essentially arguing the losing position in *Howard*. They argue that even though the policy relates to shackling in non-jury proceedings only, judges may be prejudiced by seeing them in restraints. *Howard* cites *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) for the principle that fear of prejudice is not an issue in pretrial proceedings before judges, because "a judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles." 480 F.3d at 1012. This aligns with the Court's experience, and with common sense. Judges are trained and presumed to ignore immaterial matters, such as how defendants are dressed or whether they are restrained. *See Zuber* at 104 ("We traditionally assume

that judges, unlike juries, are not prejudiced by impermissible factors.") It is also true that judges routinely are aware of information about defendants both before and during trial that would be deemed unduly prejudicial if known to jurors, and yet are presumed not to be biased despite their exposure to such information.

The ubiquity of restraints also mutes their effect. Judges in this District and in various trial courts around the country routinely see defendants in restraints, so regularly, in fact, that it has become like "white noise." The fact that restraints are the norm and not reserved for a disfavored few also strips them of any real significance to judges. The leg shackles, in fact, are not even visible to judges most of the time. This has led to the ironic spectacle of Federal Defenders lawyers having to ask defendants to stand up or to shift position to display them before arguing that the judge's newly-acquired knowledge of the restraints is unfairly prejudicial.

While shackles and similar restraints are not routine before juries, *see Deck*, 544 U.S. at 631, they are commonplace in non-jury proceedings. They are used in most if not all federal district courts. And in California state courts, where cameras are permitted, television news broadcasts commonly show defendants making their pretrial appearances not only shackled, but also in jailhouse garb and from behind a plexiglass barrier. When security precautions such as these are so common as to be routine, they cannot reasonably be considered a breach of decorum or a violation of courtroom dignity.

Punitive Use of Shackling

If a particular restriction on pretrial detainees is "reasonably related to a legitimate government objective," it does not constitute punishment. *Bell*, 441 U.S. at 539. On the other hand, if the restraints are arbitrary or purposeless, it might reasonably be inferred that they are punitive. *See id.* But here, for reasons discussed more fully below, they are not.

The rationale behind the Court's policy regarding use of restraints is security, not punishment, and the policy cannot reasonably be construed as punitive in its intent or effect. Defendants rely on the fact that they are treated differently than in-custody material witnesses as support for their argument. But the distinction between the two groups is based on different security concerns, as well as an even greater solicitude for the release of witnesses as soon as possible. *See, e.g.*, *Torres Ruiz v. U.S. Dist. Court*, 120 F.3d 933, 935-36 (9th Cir. 1997) (pointing out "tremendous hardship" suffered by material witnesses who are held in custody despite no criminal charges pending against them); 18 U.S.C. § 1344 (providing for the release of material witnesses if their testimony can be preserved by deposition). Moreover, the policy itself incorporates broad deference to the Marshals, and there are numerous exceptions to the use of shackling that are uncharacteristic of a punitive policy. The Chief Judge's letter outlining the policy also discusses security needs, and how shackling helps address those. Defendants' pointing to the theoretical possibility that shackling could be used punitively provides insufficient reason to set aside the policy here.

Fourth Amendment Claims

These are the heart of Defendants' claims. Defendants argue that because a liberty interest is at stake, the least restrictive means must be used, and that an individualized determination of dangerousness is required for each detainee to be made after an evidentiary hearing. They also argue that the evidence does not support a determination that shackling is necessary, and they maintain that the Court must rely on empirical and statistical data and analysis before making policy decisions implicating shackling. In fact, none of this is required.

The U.S. Marshals are charged with maintaining security in federal courthouses, and bringing detainees and prisoners to and from court for trials and other proceedings. See *Zuber*, 118 F.3d at 104. These duties include, among other things, preventing escapes; and preventing detainees from attacking each other, or from attacking others such as court staff, the public, or the Marshals themselves. Inherent in their authorization to move detainees and provide security is the authority to use reasonable force. *See Muehler v. Mena*, 544 U.S. 93, 98-99 (2005) (holding that, inherent in an authorization to detain a person is the authority to use reasonable force to effectuate the detention). The Court likewise has inherent authority to direct the Marshals and court security personnel to use reasonable force to maintain order and security and to ensure that proceedings are carried out in an efficient, orderly, and dignified manner. *See Chambers v. NASCO*, Inc., 501 U.S. 32, 43 (1991) (holding that courts possess the inherent authority to impose decorum in their pres-

ence); *In re Gustafson*, 650 F.2d 1017, 1024 (9th Cir. 1981) (citing *Ex parte Terry*, 128 U.S. 289, 303 (1888)) ("Federal courts have the inherent power to preserve order and decorum in court proceedings.")

Whether restraints such as handcuffs may be used to effect a detention is a Fourth Amendment question. *Muehler*, 544 U.S. at 99; *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (explaining that the Fourth Amendment addresses pretrial deprivations of liberty). The Fourth Amendment does not prohibit all seizures of persons, only unreasonable ones. *Maryland v. Buie*, 494 U.S. 325, 331 (1990). In determining reasonableness, the Court balances the intrusiveness of the seizure against legitimate governmental interests. *Id.* *Bell* itself also uses reasonableness as the standard against which searches and seizures of pretrial detainees is measured. 441 U.S. at 539-41. *See also Howard*, 480 F.3d at 1014 (upholding the shackling policy, noting it was adopted "following consultation with the Marshals Service to address legitimate security concerns" in the courthouse). Contrary to the Defendants' arguments, there is no "least restrictive means" requirement.

At argument, counsel for Federal Defenders suggested that because, in their view, circumstances were the same as in years past, the policy could not be made stricter. But, as explained in *Bell*, a restraint policy need only be based on some legitimate government interest. *See Bell* at 538. Even assuming, *arguendo*, there were no new information or developments, nothing prevents the Courts or the Marshals from reconsidering whether an existing policy might be improved. No

showing of crisis or imminent breakdown of order is required.

The basis for Court's determination regarding the need for restraints is outlined in the Chief Judge's letter, and is also supported by other anecdotal evidence, individual judges' observations, and common sense judgements. The letter, among other things, cites a recent stabbing in recently retired Judge Irma Gonzalez's courtroom, an assault by one prisoner on another in the El Centro Magistrate Judge courtroom, and multiple incidents of prisoner-made weapons being found in holding cells.[2] This information was evaluated by the judges in light of the large number of in-custody prisoners the Marshals are responsible for (44,426 court appearances, an average of 178 per day, in 2012), the number of available Marshals,[3] the physical layout of

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[2] At argument it was pointed out that detainees are searched twice before reaching these cells. The fact that detainees manage to smuggle weapons in even after these precautions had been taken underscores the fact that basic security precautions are insufficient to prevent detainees from attacking each other, and that additional measures such as shackling of detainees while in holding cells is needed.

[3] At the hearing, Defendants argued that Congress cannot circumvent constitutional requirements by failing to provide funding or authorize staffing, and the Court agrees in principle with this. That being said, the practical limitations of providing security must play some role in the Court's and the Marshals' determinations. *See Bell*, 441 U.S. at 547-48 (explaining that courts must consider the realities of operating a detention center when examining the constitutionality of pretrial detainees' detention); *Howard*, 480 F.3d at 1014 ("We further note that understaffed security officers must provide courtroom security in a large and unsecured space.") The fact that some increase in comfort or some improvement in the

courtrooms and the courthouses, and the heightened need for security in proceedings involving multiple defendants.

The judges of this district also based their decision on their consultation with the U.S. Marshals Service. During one meeting, the U.S. Marshal for this District, Steven Stafford, discussed the changing demographics of criminal defendants in this District, including changes in the crimes charged and the defendants' violent histories. Individual judges' own experience, and anecdotal evidence also supports the conclusion that security needs have increased. This is illustrated by Judge Houston's order denying the appeal of the magistrate judge's shackling order in *Sanchez-Gomez*. Judge Houston points out that in years past, when many defendants were merely undocumented immigrant laborers, security was not so great a concern. (Docket no. 15 in case 13mj3928, at 1:27-2:3.) But with the emphasis on prosecuting defendants with violent or extensive criminal histories, and ties to gangs or drug cartels, the need for security has increased in recent years. (*Id.* at 2:2-3.) It also bears mention that in all cases governed by the policy, a magistrate judge or the federal grand jury has already determined that there is probable cause to believe that the defendant has committed at least one federal felony offense.

At argument, it was also pointed out that with the opening of the new courthouse annex in this District in December, 2012, the Marshals must now cover a larger

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treatment of pretrial detainees is theoretically possible does not mean it is constitutionally required. *See Bell* at 545-46.

area with the same number of staff. In general there are enough Marshals to provide security in courtrooms and to transport detainees up and down elevators between the large holding area in the courthouse basement and individual courtroom holding cells. But there are not enough Marshals to be present in each courtroom holding cell all the time; the cells instead are monitored by cameras so that Marshals can respond to security incidents there. Marshals must also respond to security incidents anywhere in the courthouse complex.

Time and manpower are also issues to be considered in the calculus of what is reasonable. It was established during the hearing that removing shackles ordinarily requires three Marshals, although it can be done with two if necessary. One, or ideally two Marshals stand guard to prevent attacks on the Marshal who is unlocking and removing the shackles, either by kicking, or by swinging hand shackles like a mace. The unshackling process takes between two and three minutes per detainee. In addition, as the Court noted, during a criminal calendar, practical considerations make it impossible to know the sequence in which each case will be called. On a typical calendar day, judges in this district routinely hear upwards of 20 cases or more. Requiring the unshackling of each defendant before the hearings, and re-shackling each one afterwards for safe transport, would result in delays of up to two hours. Besides eating up court time, defendants would be held in restraints longer (while waiting for their cases to be called) and their hearings would be delayed.

Another factor to be considered is the U.S. Marshals' Service's published, nationwide policy on shack-

ling, a copy of which was provided to Defendants. This District, peculiarly, was out of step with that policy, and the Court concludes that the need for national consistency should also be considered in assessing the overall reasonableness of this District's revised policy. The risk of harm to detainees and others is minimized if the Marshals follow clear, uniform rules and observe routine procedures to secure prisoners and maintain appropriate control. *See Muehler*, 544 U.S. at 99 (citing *Michigan v. Summers*, 452 U.S. 692 (1981) for the principle that risk to all present is minimized if officers routinely exercise control of the situation by uniformly detaining occupants of places they search). Additionally, that this is a border district, where multiple defendants often enter pleas *en masse* before magistrate judges, and where many cases stem from activities of violent drug cartels, suggests a need for security that is at least as great as in other districts.

Although the Court granted Defendants' discovery motion only in part, argument on the motion in chief made clear why the broad discovery they sought was not needed. First, as the Court noted at the hearing, there is a remarkable degree of agreement as to the facts and reasons underlying the policy. Aside from the disagreement over the need for statistical evidence, there was no fact, evidence, or information significant to Defendants' argument that was not known. Although Defendants argued for a full evidentiary hearing, there was no need for one because the Court accepted all of the parties' proffers. The evidence Defendants sought would not have aided in the resolution of the constitutional issues that they raised. This is consistent with

the Ninth Circuit's approach in *Howard*, where the panel approved the shackling policy at issue on the basis of even more generalized information.

Defendants argue that the necessity of shackling, and degree of detainee dangerousness is required to be established by statistical evidence. Neither the Supreme Court nor the Ninth Circuit requires this, and in fact such a requirement would contradict the "reasonably related" standard applied in *Bell*. Furthermore, it is impractical; if courts were required to base shackling decisions only on statistical or empirical evidence, hardly any defendant could ever be restrained in any way. As a practical matter, it is impossible to predict with certainty which defendants are violent or likely to attempt an attack. In this Court's experience, criminal history documentation is typically both under- and over-inclusive. It may capture some criminal activity that appears violent, but actually may not be (such as a push or a shove charged as assault). At the same time, it often fails to reflect the dangerous or violent way in which some facially nonviolent crimes are committed (such as highly dangerous or even violent attempts to evade capture). Attacks are also committed by detainees with no criminal history, such as those seeking to join gangs who are commanded by gang leaders to attack a fellow detainee as an initiation rite. The attack in El Centro, for example, was committed by a detainee with no criminal history at all, and no indicia of dangerousness. And, while it is possible to separate known enemies, or separatees (detainees such as suspected child molesters who are more likely to be attacked), attacks may also occur when an at-

tacker mistakenly misidentifies a fellow detainee as an enemy or as a separatee.

Additionally, because defendants are often present in court under emotionally-charged circumstances, they may behave unpredictably or irrationally. Besides fellow detainees, the most obvious targets for violence are the Marshals or court security officers who must remain in close proximity to them. But it is not unknown for defendants to attack others, even their own counsel, either out of frustration or to gain some perceived advantage such as new counsel or a mistrial. *See, e.g.*, Dana Littlefield & Greg Moran, *Defendant Slashes His Lawyer's Face in Court*, San Diego Union-Tribune, December 14, 2012, at B1.[4]

The Court also verified at the time of the hearing that not all security incidents are documented or reported. According to Supervisory Deputy Marshal Keith Johnson, who was present at the hearing, an intentional attack or the discovery of a weapon, for example, would ordinarily be documented. But by contrast, a detainee's brief struggle with officers or a detainee's throwing an object across the courtroom (a recent event in this Court) would typically not be documented. The underreporting of incidents that might suggest a tendency towards violence is another reason why statistical analysis by itself is insufficient, and why

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[4] The article documents a recent and well-known attack on defense counsel (who happens also to be a member of this Court's CJA panel) that occurred in California state court. Despite being searched, the defendant had managed to smuggle a razor blade in his mouth. At the time of the attack, a jury and more than a dozen high school students on a field trip were present in the courtroom.

local judges', Marshals', prosecutors', and defense attorneys' own anecdotal experience and collective wisdom should reasonably be considered as they were here.

Requiring the Marshals to engage in the kind of statistical analysis Defendants advocate in order to justify the use of shackles is the kind of micromanagement that *Bell* explained was inappropriate. 441 U.S. at 547-48. The Marshals are familiar with the tasks of guarding detainees, maintaining courtroom security, and transferring detainees to and from court. It is reasonable for the Court to defer to their expertise in retaining control over the courthouse and especially the courtrooms. At the same time, the policy expressly permits judges to weigh the countervailing interests that the Defendants have identified, and to direct deviations from the policy in particular cases. *See Howard*, 480 F.3d at 1013-14 (citing *United States v. Mayes*, 158 F.3d 1215, 1226 (11th Cir. 1998)) (pointing out, with approval, that the shackling policy was instituted after consultation with the Marshals Service, on whose expertise the lower court was entitled to rely).

Conclusion and Order

For all of the above reasons, the Court holds that this District's policy on shackling of pretrial detainees during non-jury proceedings, as outlined in the Chief Judge's letter, is reasonably related to legitimate government interests and does not violate Defendants' constitutional rights. Accordingly, the Emergency Motion is **DENIED**. Because the Court holds the shackling policy is constitutional, and because the magistrate judges did not abuse their discretion in applying it, the individual Defendants' appeals are **DENIED**.

IT IS SO ORDERED.

DATED: Nov. 21, 2013

/s/ LARRY A. BURNS
HONORABLE LARRY ALAN BURNS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 13 CR 3876

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK WILLIAM RING, DEFENDANT

Nov. 18, 2013
Monday, 3:00 PM
Motion Hearing

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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[77] case being argued in front of the panel. Of course my understanding of the appellate law is questions traded during oral argument are not precedential. They may be judge's attempts to test the litigants' thinking during argument, but they aren't themselves precedent.

And then one final minor point, Ms. Barros mentioned the ***Clemmons*** decision that the government cited in its papers. It's true that the recusal question and recusal motion in that case was heard by a different judge other than the trial judge against whom the motion was lodged, but that was because it was at the request of the trial judge. So the judge sitting in your position receiving a recusal motion in that case requested he be reassigned presumably because he made some determination in that case that the recusal question should go to another judge.

THE COURT: All right. I know that this is not the end of it and anything I say here today is not the last word or anything. Let's make sure we have the record complete. Anything else either side wants to offer on the recusal issue that we haven't already said?

MS. BARROS: No, your honor.

MR. PILCHAK: No, your honor.

THE COURT: As to the underlying substantive matter, the appeal of the magistrate judge's denial of the defendant's request to appear unshackled, the Court's [78] tentative ruling is to respectfully deny that appeal also.

Again essentially for the reasons set forth in the government's response and opposition, briefly stated and I guess we have already said this, that this Court finds it prudent to defer to the considered judgment of the Marshals office whose job it is to provide courtroom security.

In addition, the Court reads current Ninth Circuit case law, including the ***Howard case***, some people seem to read it a little differently from the way I read it, but the way I read it is that it authorizes shackling in a non-jury setting when conducted pursuant to an approved policy of the Marshals office, which is what we have here.

As counsel know, the Ninth Circuit in ***Howard*** seems to be in accord with other circuits on the same issue and it cites approvingly, as counsel here know, Second Circuit in ***U.S. versus Zuber***, Z-U-B-E-R which I'll quote, "the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing." Unquote.

That's what we're dealing with here. Obviously, if we were talking about a jury, it is a whole different kettle

of fish. We're talking about non-jury appearances here and the use of shackles and pursuant to an approved policy of the [79] Marshals office in a non-jury setting.

So on that record, I think the magistrate judge here made the correct ruling and my tentative thought there is to deny the appeal; in essence, to affirm the ruling. So that's the tentative thought. I'll hear from defense counsel. Anything else to add on that?

MS. BARROS: Yes, your honor.

Your honor, I think that the, respectfully, I think the Court is misreading the ***Howard*** case. ***Howard***, at the outset, found there was an adequate justification of necessity for the policy that was at issue in that case. It was a limited policy that was at issue, which dealt with leg irons only, in comparison to the full restraints that are being utilized in this district and it was a policy that was applied at initial appearance and there had been a full evidentiary record in the ***Howard case*** before the case went up on appeal.

There had been exhibit lists and a lot of information that was presented to the Court about the specifics in that district and in particular, even the courtroom that was utilized for new complaints or for initial arraignment in the Central District, they referred to "the Roy Bauer Courthouse," which I understand is a particularly large courtroom that can accommodate the multi, multi defendant cases. So I believe it's 40 or perhaps more defendants that

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[114] masse guilty pleas. In fact the Ninth Circuit addressed that because apparently that happened in Arizona and the Ninth Circuit reversed that practice, but that isn't something that occurred or should be occurring. For initial appearances, there are multiple defendants and sometimes apart from those two types of appearances, we rarely see multiple defendants, unless it's a multi defendant case, that are brought ought out together for court.

Just very briefly, I meant, I didn't finish my thought earlier when I was talking about the staffing shortages and we have actually had some Marshals comment in court that they couldn't shackle before because it required more of them to actually shackle. So we really dispute that the issue with respect to staffing shortages necessitates shackling. My understanding is now with the shackling policy, we actually need to have more Marshals present to do the shackling than they did in the past. So your honor, with that, I will submit on the face.

THE COURT: All right. Thanks, counsel. The matter has been very well briefed and argued today. I think we made a good record here. I'll go ahead and confirm what originally was stated as the Court's tentative ruling, that is with all due respect, the motion is denied and the magistrate judge's decision is confirmed.

Anything else we should do for the record or otherwise?

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APPENDIX E

28 U.S.C. 566 (2012 & Supp. III 2015) provides:

Powers and duties

(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.

(b) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in that district, and of the Court of International Trade holding sessions in that district, and may, in the discretion of the respective courts, be required to attend any session of court.

(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.

(d) Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

(e)(1) The United States Marshals Service is authorized to—

(A) provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding;

(B) investigate such fugitive matters, both within and outside the United States, as directed by the Attorney General;

(C) issue administrative subpoenas in accordance with section 3486 of title 18, solely for the purpose of investigating unregistered sex offenders (as defined in such section 3486); and

(D) assist State, local, and other Federal law enforcement agencies, upon the request of such an agency, in locating and recovering missing children.

(2) Nothing in paragraph (1)(B) shall be construed to interfere with or supersede the authority of other Federal agencies or bureaus.

(f) In accordance with procedures established by the Director, and except for public money deposited under section 2041 of this title, each United States marshal shall deposit public moneys that the marshal collects into the Treasury, subject to disbursement by the marshal. At the end of each accounting period, the earned part of public moneys accruing to the United States shall be deposited in the Treasury to the credit of the appropriate receipt accounts.

(g) Prior to resignation, retirement, or removal from office—

(1) a United States marshal shall deliver to the marshal's successor all prisoners in his custody and all unserved process; and

(2) a deputy marshal shall deliver to the marshal all process in the custody of the deputy marshal.

(h) The United States marshals shall pay such office expenses of United States Attorneys as may be directed by the Attorney General.

(i) The Director of the United States Marshals Service shall consult with the Judicial Conference of the United States on a continuing basis regarding the security requirements for the judicial branch of the United States Government, to ensure that the views of the Judicial Conference regarding the security requirements for the judicial branch of the Federal Government are taken into account when determining staffing levels, setting priorities for programs regarding judicial security, and allocating judicial security resources. In this paragraph, the term "judicial security" includes the security of buildings housing the judiciary, the personal security of judicial officers, the assessment of threats made to judicial officers, and the protection of all other judicial personnel. The United States Marshals Service retains final authority regarding security requirements for the judicial branch of the Federal Government.